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Supreme Court, U.S.
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No. ——

# In The
# Supreme Court of the United States

EUGENE WRINN, JR.,
*Petitioner*,

v.

DAREN JOHNSON, G.K. MANLEY, AND K.J. KOVERMAN,
*Respondents*.

*On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit*

## PETITION FOR WRIT OF CERTIORARI

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## QUESTION PRESENTED

Under the Supremacy Clause, the "elements of, and the defenses to, a federal cause of action are defined by federal law."[1] The Sixth Circuit held that the waiver-of-claims provision in Ohio's Court of Claims Act barred Wrinn's federal civil-rights claims against individual state employees because Wrinn sued the State in Ohio's Court of Claims. Does the Ohio statute's waiver provision, as applied by the Sixth Circuit, violate the Supremacy Clause by creating a state-law defense to federal civil-rights claims?

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[1] *Howlett v. Rose*, 496 U.S. 356 (1990).

## LIST OF PARTIES

Eugene Wrinn, Jr., Petitioner;

Daren Johnson, Ohio State Highway Patrol, Respondent;

G. K. Manley, Ohio State Highway Patrol, Respondent;

K. J. Koverman, Ohio State Highway Patrol, Respondent;

City of Lima, Defendant;

Curt Hile, Lima Police Department, Defendant;

John Dunham, Jr., Lima Police Department, Defendant;

Officer Douglass, Lima Police Department, Defendant;

Bev Leary, Lima Police Department, Defendant;

C. Stevenson, Lima Police Department, Defendant;

A. Cortes, Lima Police Department, Defendant;

J. G. Garlock, Lima Police Department, Defendant;

Allen County, Ohio, Defendant;

Robert Tomasi, Allen County Sheriff's Office, Defendant;

T. Myers, Allen County Sheriff's Office, Defendant; and

Daniel W. Beck, Allen County Sheriff's Office, Defendant.

## CORPORATE DISCLOSURE STATEMENT

Petitioner Eugene Wrinn, Jr. is an individual and not a subsidiary or affiliate of a publicly-owned corporation. No party to the appeal is a publicly-owned corporation that has a financial interest in the outcome.

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## PETITION FOR A WRIT OF CERTIORARI

Eugene Wrinn, Jr. respectfully petitions for a writ of certiorari to the United States Court of Appeals for the Sixth Circuit, in *Wrinn v. Johnson*, et al.

## OPINIONS BELOW

The order of the United States Court of Appeals for the Sixth Circuit denying en banc rehearing of the three-judge panel decision appears at Appendix D and is unpublished. The United States Court of Appeals for the Sixth Circuit's opinion affirming the United States District Court for the Northern District of Ohio's dismissal of the individually named officers of the Ohio State Highway Patrol appears at Appendix A and is unpublished. The Supreme Court of Ohio's order denying certification appears at Appendix G and is unpublished. The United States Court of Appeals for the Sixth Circuit's certification order to the Supreme Court of Ohio appears at Appendix B and is unpublished. The United States Court of Appeals for the Sixth Circuit's order denying Wrinn's petition for initial en banc review appears at Appendix F and is unpublished.

The United States District Court for the Northern District of Ohio's opinion certifying its dismissal entry for appeal appears at Appendix E and is unpublished. The United States District Court for the Northern District of Ohio's decision dismissing the individually named officers of the Ohio State Highway Patrol appears at Appendix C and is unpublished.

## JURISDICTION

On March 4, 2009, the United States Court of Appeals for the Sixth Circuit affirmed the United States District Court for the Northern District of Ohio's dismissal of Petitioner's civil-rights claims against the individually-named Ohio State Highway Patrol officers. The United States Court of Appeals for the Sixth Circuit denied Wrinn's petition for rehearing en banc on May 20, 2009. This Court has jurisdiction to review the federal constitutional issues raised by Wrinn's petition under 28 U.S.C. § 1254(1).

## RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Supremacy Clause of the United States Constitution, U.S. Const., art. VI, cl. 2:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

United States Constitution, art. III, cl. 1:

> The judicial Power of the United States shall be vested in one supreme court, and in such inferior Courts as the Congress may from time to time ordain and establish.

Title 42 U.S.C. § 1983: Civil action for deprivation of rights:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Ohio Rev. Code § 9.86:

> Except for civil actions that arise out of the operation of a motor vehicle and civil actions in which the state is the plaintiff, no officer or employee shall be liable in any civil action that arises under the law of this state for damage or injury caused in the performance of his duties, unless the officer's or employee's actions were manifestly outside the scope of his employment or official responsibilities, or unless the officer or employee acted with malicious purpose, in bad faith, or in a wanton or reckless manner.

> This section does not eliminate, limit, or reduce any immunity from civil liability that is conferred upon an officer or employee by any other provision of the Revised Code or by case law. This section does not affect the liability of the state in an action filed against the state in the court of claims pursuant to Chapter 2743 of the Revised Code.

Ohio Rev. Code § 2743.02(A)(1):

> Except in the case of a civil action filed by the state, filing a civil action in the court of claims results in a complete waiver of any cause of action, based on the same act or omission, which the filing party has against any officer or employee, as defined in section 109.36 of the Revised Code. The waiver shall be void if the court determines that the act or omission was manifestly outside the scope of the officer's or employee's office or employment or that the officer or employee acted with malicious purpose, in bad faith, or in a wanton or reckless manner.

## STATEMENT

**1.** Wrinn sustained a head injury and lost consciousness in a head-on collision between his pick-up and a semi-truck. (Complaint, ¶ 25, Apx. J, pg. 77a). As Ohio State Highway Patrol ("OSHP") Sergeant Daren Johnson arrived, Wrinn regained consciousness and got out of his truck. (Complaint, ¶¶ 25-31, Apx. J, pp. 77a-78a). Sergeant Johnson told Wrinn to stay in the truck. Wrinn was disoriented, however, and unable to comply with Johnson's

instructions. Johnson grabbed Wrinn but Wrinn continued walking away. (Complaint, ¶¶ 33-39, Apx. J, pp. 78a-79a). Johnson hit Wrinn in the head with a metal flashlight and tasered him. (Complaint, ¶¶ 33-39, Apx. J, pp. 78a-79a). Other law enforcement officers arrived, and they also used force against Wrinn. (Complaint, ¶¶ 41-48, Apx. J, pp. 79a-80a).

Wrinn was hit several times with metal flashlights, tasered three or four times, and shot in the face with pepper spray. He was struck at least 12 times in the ribs, and an officer stood on his head. Wrinn sustained severe injuries, some of which are permanent. (Complaint, ¶¶ 50-51, Apx. J, pp. 80a-81a).

**2.** On September 11, 2006, Wrinn brought a 42 U.S.C. § 1983 action against three OSHP officers in their individual capacities alleging use of excessive force and other federal civil-rights violations. (Complaint, ¶¶ 75-77, 85-90, Apx. J, pp. 85a-89a). Wrinn also brought § 1983 claims and state-law tort claims against seven Lima, Ohio police officers, three Allen County, Ohio sheriff's deputies, and the respective governmental agencies. (Complaint, Apx. J, pp. 82a-89a). The Northern District of Ohio had jurisdiction over Wrinn's §1983 claims under 28 U.S.C. § 1331 and under 28 U.S.C. § 1343.

Two days later, on September 13, 2006, Wrinn sued the State of Ohio and two of the OSHP officers in the Ohio Court of Claims under the Ohio Court of Claims Act ("OCCA"), Ohio Rev. Code § 2743.02(A)(2). Wrinn's OCCA complaint alleged only state-law tort claims. (Ohio Court of Claims Complaint, Case No. 2006-05934, Apx. K, pp. 91a-100a). The Ohio Court of Claims, *sua sponte*, dismissed the individual officers

because only the State can be sued in the Court of Claims. The Court of Claims stayed *Wrinn v. Ohio*, Case No. 2006-05934, pending the resolution of this case.

**3.** The district court dismissed Wrinn's § 1983 claims. It held that by electing to sue the State in the Ohio Court of Claims, Wrinn waived the right to pursue his § 1983 claims against the OSHP officers in federal court. (Memorandum Opinion and Judgment Entry, Apx. C, pg. 26a). The district court relied on *Leaman v. Ohio Department of Mental Retardation & Developmental Disabilities*, 825 F.2d 946 (6th Cir. 1987) (en banc), *cert. denied* 487 U.S. 1204 (1988). There, in the absence of a controlling interpretation of the OCCA from the Supreme Court of Ohio, the Sixth Circuit ruled that the OCCA's waiver provision includes the waiver of § 1983 claims against individual state actors.

The OCCA provides that "filing a civil action in the court of claims results in a complete waiver of any cause of action" against individual state employees arising out of the same facts. (Apx. H at pp. 47a-52a).

The district court recognized that after the Sixth Circuit decided *Leaman*, the Supreme Court of Ohio, in *Conley v. Shearer*, 64 Ohio St. 3d 284, 595 N.E.2d 562 (1992), interpreted the OCCA contrary to the holding in *Leaman*. The Supreme Court of Ohio, relying on this Court's decision in *Howlett v. Rose*, 496 U.S. 356 (1990), held that the OCCA does not apply to federal claims. (Apx. I at pp. 67a-68a). The district court, citing the need to reconcile the conflict between the Supreme Court of Ohio and the Sixth Circuit decisions, allowed an immediate appeal.

(Memorandum Opinion and Order, Apx. E, pp. 41a-42a).

**4.** Wrinn appealed. The Sixth Circuit affirmed the dismissal. It relied solely on its decisions in *Leaman* and in *Thomson v. Harmony*,[2] both of which held that Ohio Rev. Code § 2743.02(A)(1) bars a plaintiff from bringing a federal civil-rights action in federal court against a state employee if the plaintiff elected to sue the State of Ohio in the Court of Claims.

The Sixth Circuit did not address Wrinn's Supremacy Clause argument. The Sixth Circuit then denied Wrinn's Motion for En Banc Rehearing while *Haywood v. Drown* was pending before this Court and undecided.[3]

Wrinn now petitions this Court for a Writ of Certiorari.

## REASONS FOR GRANTING THE WRIT

The Court should grant the Petition because the Sixth Circuit's decision:

- fails to examine Wrinn's case in light of *Haywood v. Drown* and other controlling federal precedent;

- conflicts with this Court's decisions under the Supremacy Clause; and

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[2] 65 F.3d 1314 (6th Cir. 1995), *cert. denied* 517 U.S. 1105 (1996).

[3] *Haywood v. Drown*, __ U.S. __, 129 S.Ct. 2108 (2009).

- conflicts with other circuit court decisions holding that state-created immunities and defenses cannot be applied to bar federal civil-rights claims.

The Court should also grant the Writ to exercise its supervisory powers in order to ensure (1) that the Sixth Circuit's en banc rule does not unduly impede adjudication of constitutional questions; and (2) that the lower federal courts uniformly apply the principles of comity and federalism by deferring to the decisions of a state's highest court on issues of state law.

## I. This Court should grant certiorari, vacate, and remand Wrinn's case to allow the Sixth Circuit to consider Wrinn's § 1983 claim under *Haywood v. Drown*.

This Court routinely grants certiorari, vacates, and remands (hereinafter "GVR order") where it has reason to believe that the court below did not examine the case in light of controlling federal precedent.[4] "[A] GVR order guarantees to the petitioner full and fair consideration of his rights in light of all pertinent considerations."[5] And a GVR order "promotes fairness and respects the dignity of [the court below] by

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[4] *See Kochl v. Mirza*, __ U.S. __, 129 S.Ct. 2734 (2009); *Stutson v. United States*, 516 U.S. 193, 194-96 (1996), *Lawrence v. Chater*, 516 U.S. 163, 167-68 (1996), and *Henry v. City of Rock Hill*, 376 U.S. 776, 776-77 (1964).

[5] *Stutson*, 516 U.S. at 197.

enabling it to consider potentially relevant decisions and arguments that were not previously before it."[6]

Six days after the Sixth Circuit denied Wrinn's Petition for Rehearing En Banc, this Court decided *Haywood*. In *Haywood*, the Court held that a state law restricting a prisoner's right to bring civil-rights claims for damages against a certain class of state employees violated the Supremacy Clause because it effectively "shut the courthouse door to federal claims" that the state considered at odds with its policy.[7] The Court reasoned that the state jurisdictional law at issue was "effectively an immunity statute cloaked in jurisdictional garb. Finding this scheme unconstitutional merely confirms that the Supremacy Clause cannot be evaded by formalism."[8]

In both the district court and the Sixth Circuit, Wrinn argued that the OCCA's waiver clause, Ohio Rev. Code § 2743.02(A)(1), shielded the OSHP officers from liability in violation of the Supremacy Clause. But in its opinion affirming the district court's dismissal of the OSHP officers, the Sixth Circuit declined to even address Wrinn's Supremacy-Clause argument. This Court should grant Wrinn's Petition for Writ to ensure that Wrinn's case is fully examined under this Court's Supremacy-Clause precedents, including the standards set forth in *Haywood*.

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[6] *Id.*

[7] __ U.S. __, 129 S. Ct. at 2117.

[8] *Id.* at 2118.

## II. This Court should grant certiorari because the Sixth Circuit's precedent in *Leaman* is in direct conflict with this Court's Supremacy-Clause precedents and has perpetuated Supremacy-Clause violations for over 20 years.

Under the Supremacy Clause, a conflict between state and federal law is resolved in favor of the federal law.[9] "[A]ny assessment of the applicability of a state law to federal civil rights litigation . . . must be made in light of the purpose and nature of the federal right."[10]

Certainly, "a State cannot employ a jurisdictional rule to dissociate itself from federal law."[11] And a state can neither immunize a defendant against nor create a defense or procedural bar to a federal claim.[12] State

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[9] U.S. Const., art. VI, cl. 2. *See also Howlett*, 496 U.S. at 356.

[10] *Felder v. Casey*, 487 U.S. 131, 139 (1988), *superseded by statute on other grounds*.

[11] *Haywood*, __ U.S. __, 129 S. Ct. at 2114.

[12] *See id.* at 2115-18; *Howlett*, 496 U.S. at 376; *Martinez v. California*, 444 U.S. 277, 284 n.8 (1980); *Dice v. Akron, Canton & Youngstown RR Co.*, 342 U.S. 359, 361 (1952) (reversing the Supreme Court of Ohio's decision on the validity of a release as applied to plaintiff's claim under the Federal Employers' Liability Act because "[s]tate laws are not controlling in determining what the incidents of this federal right shall be" where the state court had determined a validity of a release under state law); *Swipies v. Kofka*, 419 F.3d 709, 716 (8th Cir. 2005) (citing *Martinez*, 444 U.S. at 284 n.8, state immunity laws cannot provide a defense to a § 1983 action).

jurisdictional rules that are effectively immunity provisions against federal claims still violate the Supremacy Clause.[13]

Under 42 U.S.C. § 1983, Congress provided the federal courts as a forum for the vindication of federal civil-rights violations by persons acting under color of state law.[14] The broad remedial purpose behind 42 U.S.C. § 1983 is to provide a federal remedy "against all forms of official violation of federally protected rights."[15] "[T]he most important policies underlying § 1983 include compensation of persons injured by deprivation of federal rights and prevention of abuses of power by those acting under color of state law."[16]

The Supremacy Clause "secures federal rights by according [42 U.S.C. § 1983] priority whenever [§ 1983] come[s] into conflict with state law."[17] And Congress is the only legislative body that may "specifically

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[13] *Haywood*, __ U.S. __, 129 S. Ct. at 2118.

[14] *See also* 28 U.S.C. § 1343(3) (stating that district courts have original jurisdiction "[t]o redress the deprivation, under color of law, statute, ordinance, regulation, custom, or usage, of any right, privilege, or immunity secured by it, the Constitution of the United States.").

[15] *Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103, 105-06 (1989) (internal citations omitted).

[16] *Leaman*, 825 F.2d at 959 (Keith, J., dissenting) (quoting *Robertson v. Wegmann*, 436 U.S. 584, 591 (1978)).

[17] *Golden State Transit Corp.*, 493 U.S. at 107 (internal citations omitted).

foreclose[] a remedy under § 1983."[18] As Circuit Judge Nathaniel R. Jones warned in his dissenting opinion in *Leaman*, "[i]f the state may compel the surrender of one constitutional right as a condition of its favor, it may, in like manner, compel a surrender of it all."[19]

The Sixth Circuit's continuing refusal to bring its ruling into line with the Supremacy Clause improperly gives individual state employees a defense to plaintiffs' federal civil-rights actions under 42 U.S.C. § 1983. *Leaman* unconstitutionally abrogates the broad remedial purpose of § 1983.[20]

Based on the Court's holding in *Howlett* and as reaffirmed in *Haywood*, the use of the OCCA as a state defense to a federal statute cannot stand under the Supremacy Clause.[21]

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[18] *Id.* at 106 (internal citations omitted).

[19] *Leaman*, 825 F.2d at 969 (Jones, J., dissenting) (quoting *Frost Trucking Co. v. R.R. Comm'n*, 271 U.S. 583, 593-94 (1926)).

[20] *See* SHELDON H. NAHMOD, CIVIL RIGHTS AND CIVIL LIBERTIES LITIGATION: THE LAW OF SECTION 1983 § 9:72, 9-186 (4th ed. 1997) (*Leaman* undermines the compensation and deterrent functions of § 1983 and is invalid under the Supremacy Clause because the Sixth Circuit's ruling: (1) created an automatic waiver; and (2) precluded plaintiffs from suing under § 1983 if they sued under state law in the Ohio Court of Claims).

[21] *Leaman* and its progeny rely on the proposition that a plaintiff voluntarily waives the federal claims if the plaintiff chooses to sue the State of Ohio in the Ohio Court of Claims. But Wrinn did not voluntarily waive his federal civil-rights claims. Wrinn relied upon the decision of the Supreme Court of Ohio's unambiguous holding in *Conley v. Shearer*, 64 Ohio St. 3d 284, 595 N.E.2d 77 that the OCCA waiver clause applies only to state-law claims.

## III. The Sixth Circuit's decision conflicts with other circuit court decisions holding that state-created immunities and defenses cannot apply to bar federal claims.

Ohio's Court of Claims Act – as interpreted in *Leaman* – effectively immunizes officers or employees from federal liability in violation of the Supremacy Clause and in conflict with this Court's established precedent. *Martinez*, 444 U.S. at 284, n.8; *see also Howlett*, 496 U.S. at 376 and *Felder*, 487 U.S. at 139 ("[W]e have held that a state law that immunizes government conduct otherwise subject to suit under § 1983 is preempted . . . because the application of the state law would thwart the congressional remedy . . . which of course already provides certain immunities for state officials.").

Moreover, except for the Sixth Circuit, all circuits that have considered this issue have held that a state-immunity statute cannot bar § 1983 claims. *See Swipies*, 419 F.3d at 716 (holding that a state statute immunizing individuals from liability when acting in good faith could not be used as a defense to § 1983 liability); *Kimes v. Stone*, 84 F.3d 1121, 1127 (9th Cir. 1996) (litigation-privilege immunity in California state statute not applicable to 1983 action); *Palmer v. City of Monticello*, 31 F.3d 1499, 1504-05 (10th Cir. 1994) (rejecting application of Utah state-immunity statute to § 1983 claim); *Davis v. Little*, 851 F.2d 605, 610-11 (2d Cir. 1988) (a state rule of immunity or privilege allowing a state officer to escape liability for violating a person's civil rights is simply not controlling under 42 U.S.C. § 1983); *Wade v. City of Pittsburgh*, 765 F.2d 405, 407-08 (3d Cir. 1985) (state court judgment barring suit against city based on statutory immunity

did not preclude a § 1983 claim on the same occurrence).

## IV. This Court should grant certiorari to exercise its supervisory powers in order to ensure uniformity among the circuits.

Two extraordinary circumstances compel this Court to exercise its supervisory power. They both call for this Court to review the Sixth Circuit rule that was first announced in *Leaman* and that was applied to dispose of the appeal below. First, because *Leaman* was decided en banc, the rule announced in *Leaman* will remain controlling in the Sixth Circuit unless reviewed by this Court. Second, the Sixth Circuit has persisted in adhering to the rule announced in *Leaman* even after the Supreme Court of Ohio gave a contrary interpretation of the controlling state statute. By continuing to adhere to *Leaman* in the face of a contrary state-court decision, the Sixth Circuit has violated the comity that federal courts owe to state-court interpretations of state statues, a deference that is fundamental to federalism.

### 1. The en banc posture of *Leaman*.

The en banc stature of *Leaman* has effectively written the rule announced in that case into the fixed law of the circuit. All district courts in the circuit[22] and all panels of the circuit court are bound to follow

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[22] *See, e.g.*, Apx. C, Memorandum Opinion and Judgment Entry of the United States District Court for the Northern District of Ohio Granting the OSHP officers' Motion to Dismiss, No. 3:06 CV 2188, 2007 U.S. Dist. LEXIS 59002 (N.D. Ohio Aug. 13, 2007).

it.[23] The *Leaman* rule will, therefore, endure in the Sixth Circuit unless one of two things happens: the judges of the Sixth Circuit vote to rehear en banc a panel decision applying *Leaman* or this Court, exercising its supervisory authority over the circuits, overturns the rule in *Leaman*.

The Sixth Circuit has rejected petitions for en banc rehearing of panel decisions applying the rule in *Leaman*. In *Thomson*, for example, the court rejected the en banc rehearing petition because "no judge of this court . . . requested a vote on the suggestion for rehearing en banc."[24] By refusing to reconsider the *Leaman* rule in *Thomson*, the Sixth Circuit continues to follow *Leaman* even in the face of decisions from other circuits that reject the proposition that a state statute may effectively bar a potential § 1983 claim.[25]

**2. Comity owed to state-court interpretation of state statues.**

This Court has long recognized that even in cases presenting federal questions, considerations of federalism compel courts to accept state-court interpretations of state law. *See, e.g., Johnson v. Fankell*, 520 U.S. 911, 916 (1997) (federal civil-rights

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[23] *Turker v. Ohio Dep't of Rehab. & Corr.*, 157 F.3d 453, 460 (6th Cir. 1998) ("We are precluded from departing from *Leaman* and *Thomson's* holdings. That can only be done by an en banc court.").

[24] *Thomson v. Harmony*, No. 93-4089, 1995 U.S. App. LEXIS 31160 (6th Cir. Nov. 1, 1995), (*rehearing en banc denied*).

[25] *See* discussion and authorities cited *supra* at Reasons for Granting Writ, § III, p. 13-14.

claims: "Neither this Court nor any other federal tribunal has any authority to place a construction on a state statute different from the one rendered by the highest court of the state . . . . This proposition, fundamental to our system of federalism, is applicable to procedural as well as substantive rules.") (citing *New York v. Ferber*, 458 U.S. 747, 767 (1982) (First Amendment challenge to state statute: "the construction that a state court gives a state statute is not a matter subject to our review")); *Exxon Corp. v. Wis. Dep't of Revenue*, 447 U.S. 207, 226, n.9 (1980) (Due Process challenge to state taxation law: Supreme Court bound to accept interpretation of state statute given by the highest court of the state); *Commissioner v. Bosch*, 387 U.S. 456, 465 (1967) (federal estate tax liability: "This is not a diversity case but the same principle may be applied for the same reasons, *viz.*, the underlying substantive rule involved is based on state law and the State's highest court is the best authority on its own law.").

The Sixth Circuit announced the rule in *Leaman* regarding the meaning of Ohio Rev. Code § 2743.02 before the Supreme Court of Ohio had the opportunity to interpret the statute. The state supreme court, however, later addressed the meaning of the statue in *Conley*. There, following this Court's long-established Supremacy-Clause precedents, the Supreme Court of Ohio reasoned why the jurisdictional procedures in the OCCA do not apply to federal claims.[26] Relying on

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[26] 64 Ohio St. 3d at 291-93, 595 N.E.2d at 869-70. *See also Pilgrim v. Brown*, No. 96 CA 8, 1997 Ohio App. LEXIS 624 at *13-14 (Ct. App. Feb. 18, 1997) (holding "the trial court could not dismiss appellant's federal law claims [under 42 U.S.C. § 1983] for subject matter jurisdiction" because "federal claims...are not subject to

*Howlett*, the Supreme Court of Ohio stated that a "construction of [§ 1983] . . . which permit[s] a state immunity defense to have controlling effect would transmute a basic guarantee into an illusory promise; and the supremacy clause of the Constitution insures that the proper construction may be enforced."[27] The Supreme Court of Ohio held, therefore, that the OCCA and Ohio's employee-immunity statute, Ohio Rev. Code § 9.86, do not apply to federal claims.

The Sixth Circuit, in conflict with the line of authority from this Court recognizing that federal courts must accept definitive expressions of state law from the state's highest court, persists in adhering to *Leaman* even after *Conley*. It did so in *Thomson* and in other cases.[28] It did so again in this case. Without

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state law defenses"); *Besser v. Dexter*, 68 Ohio App. 3d 510, 512, 589 N.E.2d 77, 78 (Ct. App. 1990) (stating that "[t]he state of Ohio cannot adopt substantive defenses or procedural bars to a federal cause of action"). NAHMOD, *supra*, n.20 at 9-186 (recognizing that in *Conley* the Supreme Court of Ohio held that the OCCA waiver provision "was inapplicable to a state court plaintiff's § 1983 claims because the Ohio statute expressly covered only actions brought under Ohio law.").

[27] 64 Ohio St. 3d at 293, 595 N.E.2d at 870 (brackets in original; internal citations omitted).

[28] The courts of the Sixth Circuit have followed *Leaman* since *Conley* was decided. *See, e.g., Wrinn v. Johnson*, 315 Fed. Appx. 560 (6th Cir. 2009); *Plinton v. County of Summit*, 540 F.3d 459, 462 (6th Cir. 2008); *Hopkins v. Ohio Dep't of Corr.*, 84 Fed. Appx. 526, 527 (6th Cir. 2003); *Alford v. Wilkinson*, No. 98-3384, 1999 U.S. App. LEXIS 20323 at *3 (6th Cir. Aug. 17, 1999); *Turker v. Ohio Dep't of Rehab. & Corr.*, 157 F.3d 453, 457 (6th Cir. 1998); *Ashiegbu v. Siddens*, No. 97-3852, 1998 U.S. App. LEXIS 5307 at *3-*4 (6th Cir. Mar. 13, 1998), *cert. denied* 523 U.S. 1141 (1998);

this Court's exercise of its supervisory authority, the Sixth Circuit will continue to ignore controlling interpretation of state law announced definitively by the Supreme Court of Ohio. Moreover, the Sixth Circuit will remain free to spread its idiosyncratic rule to similar statutes in other states within the Circuit. *See White by Swafford v. Gerbitz*, 860 F.2d 661, 663-65 (6th Cir. 1988), *cert. denied* 489 U.S. 1029 (1989).

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*Lillie v. McGraw*, No. 97-3359, 1997 U.S. App. LEXIS 35523 at *4 (6th Cir. Dec. 12, 1997); *Herstrum v. Hodge*, No. 95-3522, 1997 U.S. App. LEXIS 21293 at *5-*10 (6th Cir. Aug. 7, 1997); *Stanos v. Cooley*, No. 95-4291, 1996 U.S. App. LEXIS 30859 at *3-*4 (6th Cir. Nov. 22, 1996); *Davenport v. Trimble*, No. 96-3082, 1996 U.S. App. LEXIS 30266 at *3 (6th Cir. Nov. 18, 1996); *Gibson v. Univ. of Cincinnati*, No. 95-3461, 1996 U.S. App. LEXIS 14488 at *5-*7 (6th Cir. May 13, 1996); *Thomson*, 65 F.3d 1314; *Egesimba v. Ohio Dep't of Rehab. & Corr.*, No. 92-3703, 1993 U.S. App. LEXIS 18078 at *3-*5 (6th Cir. July 8, 1993). And *Leaman* is followed in the district courts within the circuit. *See Wee Care Child Care Ctr. v. Ohio Dep't of Jobs and Family Services*, No. 2:08 CV 193, 2009 U.S. Dist. LEXIS 8235 at *6-*12 (S.D. Ohio Jan. 23, 2009); *Prior v. Mukasey*, No. 3:08 CV 994, 2008 U.S. Dist. LEXIS 10068 at *2-*6 (N.D. Ohio Nov. 21, 2008); *Dettling v. Adams*, 575 F. Supp. 2d 842, 844 (N.D. Ohio 2008); *Portentoso v. Kern*, 532 F. Supp. 2d 920, 925 (N.D. Ohio 2008); *Gunasekera v. Irwin*, 517 F. Supp. 2d 999, 1005 (S.D. Ohio 2007) *rev'd in part on other grounds*, 552 F.3d 461 (6th Cir. 2009); *Wrinn v. Johnson*, No. 3:06 CV 2188, 2007 U.S. Dist. LEXIS 59002 (N.D. Ohio Aug. 13, 2007); *Harris v. Groce*, No. 2:05-CV-983, 2006 U.S. Dist. LEXIS 63468 at *6-*7 (S.D. Ohio Sept. 6, 2006); *Collins v. Ohio Dep't of Rehab. & Corr.*, 2005 U.S. Dist. LEXIS 22099 at *4-*5 (S.D. Ohio Sept. 30, 2005); *Higginbotham v. Ohio Dep't of Mental Health*, 412 F. Supp. 806, 812-13 (S.D. Ohio 2005); *Thomas v. Ohio Dep't of Rehab. & Corr.*, 36 F. Supp. 2d 1005, 1007 (S.D. Ohio 1999).

## CONCLUSION

Wrinn respectfully urges this Court to grant certiorari and to vacate and remand in order to give the Sixth Circuit the opportunity to review the case in light of *Haywood v. Drown*. The Court should grant certiorari because the Sixth Circuit's decision conflicts with this Court's Supremacy-Clause precedents and with the decisions of other circuits holding that state-created immunities and defenses cannot bar § 1983 claims.

The Court should also grant certiorari to exercise its supervisory powers to ensure (1) that the Sixth Circuit's en banc rule does not unduly impede adherence to this Court's precedents; and (2) that the circuits uniformly apply the principles of comity and federalism respecting the deference due the interpretation of state statutes made by the state's highest court.

WHEREFORE, Wrinn respectfully requests that the Court issue an order granting certiorari to the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,

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Date: August 17, 2009

# APPENDIX

## APPENDIX A

**NOT RECOMMENDED FOR FULL-TEXT PUBLICATION**
File Name: 09a0174n.06
Filed: March 4, 2009

**UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT**

**No. 07-4354**

**[Filed March 4, 2009]**

EUGENE WRINN, JR.,

**Plaintiff-Appellant,**

v.

DAREN JOHNSON, Ohio State Highway Patrol (Lima); G.K. MANLEY, Ohio State Highway Patrol (Lima); K.J. KOVERMAN, Ohio State Highway Patrol (Lima),

**Defendants-Appellees,**

and

CITY OF LIMA, Lima Municipal Center et al.,

**Defendants.** )
_____ )

**ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO**

**OPINION**

**Before: DAUGHTREY and MOORE, Circuit Judges; GRAHAM,* District Judge.**

**KAREN NELSON MOORE, Circuit Judge.** This case is before us for the second time, following our certification to the Supreme Court of Ohio of the following question of Ohio law: "Does OHIO REV. CODE ANN. § 2743.02(A)(1) require waiver of a party's federal causes of action against state officers or employees when that party files suit in the Ohio Court of Claims based on the same act or omission?" *Wrinn v. Johnson*, No. 07-4354, slip op. at 11 (6th Cir. Nov. 12, 2008) (unpublished order). On January 28, 2009, the Supreme Court of Ohio dismissed the certified proceeding for lack of prosecution by Plaintiff-Appellant Eugene Wrinn, Jr. ("Wrinn"). In the absence of guidance from the state court, we proceed to apply this court's precedents in *Leaman v. Ohio Dep't of Mental Retardation & Development Disabilities*, 825 F.2d 946 (6th Cir. 1987) (en banc), *cert. denied*, 487 U.S. 1204 (1988), and *Thomson v. Harmony*, 65 F.3d 1314 (6th Cir. 1995), *cert. denied*, 517 U.S. 1105

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* The Honorable James L. Graham, United States District Judge for the Southern District of Ohio, sitting by designation.

(1996), which have answered the above question in the affirmative. Accordingly, we **AFFIRM** the district court's dismissal of all of Wrinn's claims against Defendants-Appellees, three officers of the Ohio State Highway Patrol (collectively, "the OSHP officers").

The background of this case is fully set forth in our order of certification, *see Wrinn*, No. 074354, slip op. at 3-6, and we restate the relevant factual and procedural background only briefly here. Wrinn filed this lawsuit in district court on September 11, 2006, naming three groups of defendants, including the OSHP officers, and asserting six claims under 42 U.S.C. § 1983 and two state-law claims. Wrinn then filed a separate action in the Ohio Court of Claims, naming the State of Ohio and two of the OSHP officers as defendants and asserting four claims under Ohio law arising from the same set of facts alleged in Wrinn's federal complaint. The Ohio Court of Claims subsequently dismissed the two OSHP officers from the case and substituted the Ohio State Highway Patrol ("OSHP") for the State of Ohio as the named defendant. That state suit was stayed pending resolution of this federal-court action.

On October 6, 2006, the OSHP (appearing as an interested party) filed a motion to dismiss the OSHP officers from the federal action under FED. R. CIV. P. 12(b)(6), arguing that Wrinn's claims against the OSHP officers in federal court were barred under the waiver provision of OHIO REV. CODE ANN. § 2743.02(A)(1)[1], because Wrinn brought suit in the

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[1] Section 2743.02(A)(1) provides in relevant part:

> Except in the case of a civil action filed by the state, *filing a civil action in the court of claims results in a complete*

Court of Claims based on the same conduct. On August 13, 2007, the district court granted the OSHP's motion, dismissing both Wrinn's state and federal claims against the OSHP officers.[2] The district court found that it was bound by *Leaman v. Ohio Dep't of Mental Retardation & Development Disabilities*, 825 F.2d 946 (6th Cir. 1987) (en banc), *cert. denied*, 487 U.S. 1204 (1988), and subsequent decisions of this court holding that § 2743.02(A)(1) requires "a complete waiver of all claims, including federal claims, upon the filing of a similar complaint in the Ohio Court of Claims." Joint Appendix ("J.A.") at 31 (Mem. Op. at 6). On September 20, 2007, the district court granted Wrinn's motion to pursue an immediate appeal under FED. R. CIV. P. 54(b) and stayed further proceedings in the district court pending appeal. Wrinn timely appealed, and on January 22, 2008 filed a petition for initial hearing en banc, which was denied on April 11, 2008.

On appeal, Wrinn argued that the district court erred in ruling that our decision in *Leaman* controlled to bar Wrinn's claims in federal court against the OSHP officers under the waiver provision of OHIO REV.

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> *waiver of any cause of action, based on the same act or omission, which the filing party has against any officer or employee*, as defined in section 109.36 of the Revised Code. The waiver shall be void if the court determines that the act or omission was manifestly outside the scope of the officer's or employee's office or employment or that the officer or employee acted with malicious purpose, in bad faith, or in a wanton or reckless manner.

OHIO REV. CODE ANN. § 2743.02(A)(1) (emphasis added).

[2] No claims were dismissed as to the remaining defendants—officers from the Allen County Sheriff's Department, Allen County, the Lima Police Department, and the City of Lima.

CODE ANN. § 2743.02(A)(1). In *Leaman*, we held that § 2743.02(A)(1) barred a plaintiff's federal, as well as state, causes of action against state officials when the plaintiff files suit against the state in the Court of Claims based on the same acts or omissions. Subsequently, the Supreme Court of Ohio decided *Conley v. Shearer*, 595 N.E.2d 862 (Ohio 1992), which suggested that § 2743.02(A)(1) might not apply to federal civil-rights claims. But in *Thomson v. Harmony*, 65 F.3d 1314 (6th Cir. 1995), *cert. denied*, 517 U.S. 1105 (1996), we held that *Conley* did not speak to the question of whether § 2743.02(A)(1) extends to federal claims and therefore *Leaman*'s holding was undisturbed.

On November 12, 2008, we issued an order *sua sponte* certifying to the Supreme Court of Ohio the question of whether OHIO REV. CODE ANN. § 2743.02(A)(1) requires the waiver of a party's federal causes of action against state officers when that party files suit in the Ohio Court of Claims based on the same act or omission. We noted that "the Supreme Court of Ohio has never directly ruled on the question of whether § 2743.02(A)(1) is applicable to federal claims" and therefore "[o]ur decisions in *Leaman* and *Thomson* remain speculation, or *Erie* guesses, about the meaning of § 2743.02(A)(1)." *Wrinn*, No. 07-4354, slip op. at 10. We also noted, however, that "[i]f we were to decide the case before us without certifying this question to the Ohio Supreme Court . . . we would be bound by *Leaman* and *Thomson* to hold that all of Wrinn's claims against the OSHP officers are barred by § 2743.02(A)(1)." *Id.*

Our order of certification was filed at the Supreme Court of Ohio on November 13, 2008. Rule XVIII of the

Rules of Practice of the Supreme Court of Ohio requires that "[w]ithin 20 days after a certification order is filed with the Supreme Court, each party shall file a memorandum" addressing the certified question. R. of Prac. Sup. Ct. Ohio XVIII, § 6. The OSHP officers timely filed a memorandum before the twenty-day period expired on December 3, 2008. However, Wrinn's attorneys failed to file the required memorandum by the filing deadline, and the OSHP officers moved the Supreme Court of Ohio to dismiss the certified proceeding for failure to prosecute. On January 28, 2009, the Supreme Court of Ohio granted the OSHP officers' motion to dismiss for want of prosecution by Wrinn. *Wrinn v. Johnson*, No. 2008-2209 (Ohio Jan. 28, 2009).

Because the Supreme Court of Ohio dismissed the certified proceeding for failure to prosecute, we now proceed to decide the merits of Wrinn's appeal.[3] As we stated in our order of certification, our decisions in

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[3] After the Supreme Court of Ohio's dismissal of the certified proceeding, the parties filed additional briefs with this court. Wrinn filed a "Motion to Reinstate Appeal on Docket," which is incorrectly captioned and unnecessary because the case was not finally disposed of by this court and remained on our docket pending disposition of the certified proceeding in the Supreme Court of Ohio. The OSHP officers filed a"Motion to Dismiss for Failure to Prosecute," asking us to dismiss Wrinn's appeal and citing dicta from our decision in *Diamond Club v. Insurance Co. of North America*, 984 F.2d 746, 747 (6th Cir. 1993), where we cautioned that "failure to comply with state rules on certification matters. . . may lead not only to dismissal in state court, but to dismissal in this court as well." Although we find the lack of diligence by Wrinn's attorneys extremely troubling, we decline to impose the severe sanction of dismissal and instead decide Wrinn's appeal on the merits.

*Leaman* and *Thomson* hold that "a plaintiff waives all claims he may have against state officers, including federal claims, when he brings suit in the Court of Claims based on the same acts or omissions." *Wrinn*, No. 07-4354, slip op. at 10; *see also Plinton v. County of Summit*, 540 F.3d 459, 463 (6th Cir. 2008) ("The Sixth Circuit has consistently applied *Leaman* to bar plaintiffs from bringing suit in federal court against a state employee after bringing suit against the state in the Court of Claims based on the same claim."). Because Wrinn brought suit against the State of Ohio in the Court of Claims, OHIO REV. CODE ANN. § 2743.02(A)(1) bars Wrinn's claims in federal court against the OSHP officers based on the same acts or omissions.

## CONCLUSION

For the foregoing reasons, we **AFFIRM** the district court's judgment dismissing all of Wrinn's claims against the OSHP officers.

## APPENDIX B

**NOT RECOMMENDED FOR FULL-TEXT PUBLICATION**

**UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT**

**No. 07-4354**
**Supreme Court of Ohio No. 08-2209**

**[Filed November 12, 2008]**

EUGENE WRINN, JR.,

**Plaintiff-Appellant,**

v.

DAREN JOHNSON, Ohio State Highway Patrol (Lima); G.K. MANLEY, Ohio State Highway Patrol (Lima); K.J. KOVERMAN, Ohio State Highway Patrol (Lima),

**Defendants-Appellees,**

CITY OF LIMA, Lima Municipal Center, et al.,

**Defendants.**

**ON APPEAL** FROM THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN
DISTRICT OF OHIO

**ORDER OF**
**CERTIFICATION TO THE**
**SUPREME COURT OF OHIO**

**Before: DAUGHTREY and MOORE, Circuit Judges; GRAHAM,* District Judge.**

**KAREN NELSON MOORE, Circuit Judge.** Plaintiff-Appellant Eugene Wrinn, Jr. ("Wrinn"), appeals the district court's dismissal of Defendants-Appellees, three officers of the Ohio State Highway Patrol (collectively, "OSHP officers"), from his 42 U.S.C. § 1983 lawsuit alleging false arrest, excessive force, and other civil rights violations and seeking monetary relief. Wrinn's principal argument on appeal is that the district court erred in ruling that *Leaman v. Ohio Dep't of Mental Retardation & Development Disabilities*, 825 F.2d 946 (6th Cir. 1987) (en banc), *cert. denied*, 487 U.S. 1204 (1988), controls to bar Wrinn's claims in federal court against the OSHP officers under the waiver provision of the Ohio Court of Claims Act ("O.C.C.A."), OHIO REV. CODE ANN. § 2743.02(A)(1), because Wrinn brought an action in the Ohio Court of Claims based on the same conduct. In *Leaman*, we held that § 2743.02(A)(1) barred a plaintiff's federal, as well as state, causes of action against state officials when the plaintiff files

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* The Honorable James L. Graham, United States District Judge for the Southern District of Ohio, sitting by designation.

suit against the state in the Court of Claims based on the same acts or omissions. Subsequently, the Supreme Court of Ohio decided *Conley v. Shearer*, 595 N.E.2d 862 (Ohio 1992), which suggested that § 2743.02(A)(1) might not apply to federal civil-rights claims. But in *Thomson v. Harmony*, 65 F.3d 1314 (6th Cir. 1995), *cert. denied*, 517 U.S. 1105 (1996), we held that *Conley* did not speak to the question of whether § 2743.02(A)(1) extends to federal claims and therefore *Leaman's* holding was undisturbed. Still, there remains no decision by the Supreme Court of Ohio interpreting whether § 2743.02(A)(1) applies to federal causes of action.

Neither side in this appeal addressed the question of certification in their briefs. When asked at oral argument about the propriety of certifying the question of § 2743.02(A)(1)'s scope and meaning to the Supreme Court of Ohio, both Wrinn and the OSHP officers (represented by the Ohio Attorney General's office) indicated that they saw no downside to seeking an authoritative interpretation of § 2743.02(A)(1) from the Supreme Court of Ohio. We believe that the interests of judicial federalism and comity strongly favor certifying to the Supreme Court of Ohio the question of whether the state statutory provision, § 2743.02(A)(1), extends to federal causes of action. Accordingly, we **CERTIFY** the question set forth in Section II.B of this order to the Supreme Court of Ohio pursuant to Rule XVIII of the Rules of Practice of the Supreme Court of Ohio. *See generally Planned Parenthood Cincinnati Region v. Strickland*, 531 F.3d 406 (6th Cir. 2008).

## I. BACKGROUND

### A. Factual History

According to Wrinn's federal complaint, on September 16, 2005, at approximately 2:00 A.M., Wrinn was driving on Interstate-75 in Allen County, Ohio, when he lost control of his car in heavy rain and was struck head-on by a tractor-trailer. J.A. at 15 (Compl. at 6). Wrinn and his two passengers were injured in the crash, and Wrinn lost consciousness from a head injury. *Id.* As the first officer on the scene, Defendant-Appellee Sergeant Daren L. Johnson ("Johnson") of the Ohio State Highway Patrol ("OSHP"), approached Wrinn's car, Wrinn began to regain consciousness and attempted to get out of his car. *Id.* Johnson warned Wrinn to stay in the car, but Wrinn, still disoriented, began walking away. *Id.* Johnson then grabbed Wrinn, and a struggle ensued in which Johnson hit Wrinn in the head with a flashlight and then used his Taser on Wrinn. *Id.* at 16 (Compl. at 7). Other officers arrived on the scene and began assisting Johnson, including Defendant-Appellee Trooper G.K. Manley ("Manley") of the OSHP, other OSHP officers, officers from the Allen County Sheriff's Office, and officers from the Lima Police Department. *Id.*

Wrinn alleges that the various officers used excessive force in forcing him to the ground and handcuffing him, including kneeing Wrinn in the throat and chest, stepping on his head, delivering two more Taser shocks, striking him several times with a flashlight, spraying him with pepper spray, and finally requesting that emergency medical personnel give

Wrinn something to "knock him out." J.A. at 16-17 (Compl. at 7-8).

**B. Procedural History**

Wrinn filed this lawsuit in district court on September 11, 2006, naming three groups of defendants: (1) the three Defendant-Appellee OSHP officers (Johnson, Manley, and their supervisor, Lieutenant K.J. Koverman) in their individual capacities, as well as five John Does from the OSHP; (2) Allen County and various officers from the Allen County Sheriff's Office; (3) the City of Lima and various Lima Police Department officers. J.A. at 13-15 (Compl. at 4-6). Wrinn's federal complaint included six § 1983 claims and two state-law claims and requested monetary damages, litigation expenses, and attorney fees. J.A. at 18-24 (Compl. at 9-15).

Two days later, on September 13, 2006, Wrinn filed a separate action in the Ohio Court of Claims, naming the State of Ohio, Johnson, and Manley as defendants. J.A. at 50-51 (Ct. Claims Compl. at 1-2). This state-court complaint included four claims under Ohio law, arising from the same set of facts alleged in the federal complaint. J.A. at 51-56 (Ct. Claims Compl. at 2-7). The state-court complaint also requested monetary damages, litigation expenses, and attorney fees. J.A. at 56 (Ct. Claims Compl. at 7). On September 15, 2006, the Court of Claims dismissed Johnson and Manley from the case, and substituted the Ohio State Highway Patrol for the State of Ohio as the named defendant. And on December 5, 2006, the court stayed the state suit pending resolution of the federal-court action.

On October 6, 2006, the OSHP (appearing as a interested party) filed a motion to dismiss the OSHP officers (Johnson, Manley, and Koverman) from the federal action under Federal Rule of Civil Procedure 12(b)(6). J.A. at 41-49 (Mot. to Dismiss). The OSHP argued that Wrinn's claims against the OSHP officers in federal court were barred under the waiver provision of the O.C.C.A., OHIO REV. CODE ANN. § 2743.02(A)(1), because Wrinn brought suit in the Court of Claims based on the same conduct. J.A. at 44-46 (Mot. to Dismiss at 4-6).

On August 13, 2007, the district court granted the OSHP's motion, dismissing both Wrinn's state and federal claims against the OSHP officers. J.A. at 33 (Order).[1] The district court found that it was bound by *Leaman* and subsequent decisions of this court holding that § 2743.02(A)(1) requires "a complete waiver of all claims, including federal claims, upon the filing of a similar complaint in the Ohio Court of Claims." J.A. at 31 (Mem. Op. at 6). But the district court expressed concern that there was a"clear contradiction of interpretation" between this court's interpretation of § 2743.02(A)(1) and that announced by the Ohio Supreme Court in *Conley v. Shearer,* 595 N.E.2d 862 (Ohio 1992). J.A. at 30 (Mem. Op. at 5). The district court read *Conley* to hold clearly that § 2743.02(A)(1) was "inapplicable to federal causes of action," but concluded that it was bound by this court's *post-Conley* holdings that continue to interpret the § 2743.02(A)(1)

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[1] No claims were dismissed as to the remaining defendants—the Allen County Sheriff's officers, Allen County, the Lima Police Department, and the City of Lima. *See* J.A. at 35 (Mem. Op. and Order at 2).

as reaching federal claims. J.A. at 31 (Mem. Op. at 6). The district court observed that "[i]t appears incongruous to this Court that such disparate interpretations could persist between the Ohio Supreme Court and the U.S. Court of Appeals for the Sixth Circuit, given the traditional deference of federal courts to the construction of state statutes by the highest state court." *Id.* Because of this perceived conflict, the district court encouraged Wrinn to consider an immediate appeal on this issue. J.A. at 32 (Mem. Op. at 7).

On August 23, 2007, Wrinn moved the court to certify its dismissal order for interlocutory appeal under 28 U.S.C. § 1292(b) or to certify that the dismissal was final and therefore immediately appealable under Federal Rule of Civil Procedure 54(b). J.A. at 71-72 (Mot.). On September 20, 2007, the district court granted Wrinn's motion to pursue an immediate appeal under Rule 54(b) and stayed further proceedings in the district court pending appeal. J.A. at 34-37 (Mem. Op. and Order). Wrinn timely appealed. On January 22, 2008, Wrinn filed a petition for initial hearing en banc, which was denied on April 11, 2008.

## II. DISCUSSION

### A. The Propriety of Certification

Rule XVIII of the Rules of Practice of the Supreme Court of Ohio provides that the Supreme Court of Ohio may at its discretion answer a question of Ohio law certified to it by the federal courts. Before certifying a question, we must find that "there is a question of Ohio law that may be determinative of the proceeding

and for which there is no controlling precedent in the decisions of this Supreme Court." R. of Prac. Sup. Ct. Ohio XVIII, § 1. As we explain below, we find that (1) the question of whether § 2743.02(A)(1) extends to federal claims is determinative of the case before us, and (2) that there is no controlling precedent in the decisions of the Supreme Court of Ohio on whether § 2743.02(A)(1) is applicable to federal claims.

The Supreme Court of Ohio has extolled the virtues of federal court certification of unsettled questions of state law as a means of "further[ing] the state's interests and preserv[ing] the state's sovereignty." *Scott v. Bank One Trust Co.*, 577 N.E.2d 1077, 1079-80 (Ohio 1991). As the *Scott* court explained, "[p]oints of state law that seem unclear to federal courts may be quite clear to '[i]nformed local courts,' which 'may find meaning not discernible to the outsider.'" *Id.* at 1080 (quoting *Louisiana Power & Light Co. v. Thibodaux*, 360 U.S. 25, 30 (1959)). The *Scott* court further urged that "[c]ertification ensures that federal courts will properly apply state law," and protects against "inadvertent encroachments by federal courts" on state sovereignty. *Id.* at 1081. Similarly, the U.S. Supreme Court has urged federal courts to employ certification procedures when available to clarify unsettled questions of state law. "Through certification of novel or unsettled questions of state law for authoritative answers by a State's highest court, a federal court may save 'time, energy, and resources and hel[p] build a cooperative judicial federalism.'" *Arizonans for Official English v. Arizona*, 520 U.S. 43, 77 (1997) (alteration in original) *(quoting Lehman Brothers Schein*, 416 U.S. 386, 391 (1974)). We believe that these interests of comity and judicial federalism counsel strongly in

favor of certifying the unsettled question of Ohio law that is determinative of the case before us.

### 1. The Interpretation of § 2743.02(A)(1) is Determinative of this Case

Wrinn's interlocutory appeal turns entirely on the proper interpretation of § 2743.02(A)(1). Section 2743.02(A)(1) provides in relevant part:

> Except in the case of a civil action filed by the state, *filing a civil action in the court of claims results in a complete waiver of any cause of action, based on the same act or omission, which the filing party has against any officer or employee,* as defined in section 109.36 of the Revised Code. The waiver shall be void if the court determines that the act or omission was manifestly outside the scope of the officer's or employee's office or employment or that the officer or employee acted with malicious purpose, in bad faith, or in a wanton or reckless manner.

OHIO REV. CODE ANN. § 2743.02(A)(1) (emphasis added). If § 2743.02(A)(1) is interpreted to bar a party's *federal* causes of action against state officials when the party files a related suit in the Court of Claims, then Wrinn loses. If § 2743.02(A)(1) is interpreted not to encompass federal claims—or at least not federal civil-rights claims—Wrinn would prevail in this appeal.

### 2. No Controlling Precedent of Supreme Court of Ohio Interpreting § 2743.02(A)(1)

In *Leaman v. Ohio Dep't ofMental Retardation & Development Disabilities,* 825 F.2d 946, 951-53 (6th Cir. 1987) (en banc), *cert. denied,* 487 U.S. 1204 (1988), an en banc panel of this court held that § 2743.02(A)(1) barred a plaintiff's federal, as well as state, causes of action against state officials when the plaintiff files suit against the state in the Court of Claims based on the same acts or omissions. The *Leaman* court characterized the waiver provision as a *quid pro quo* in which the state agreed to waive its sovereign immunity and in exchange the plaintiff agreed to waive any claims against state employees. *Id.* at 954. "Although this portion of *Leaman* produced six dissenters, and has been the target of much scholarly criticism, it remains the law of this circuit." *Turker v. Ohio Dep't of Rehab. & Corr., 157* F.3d 453, 457 (6th Cir. 1998) (footnote omitted) (citing legal scholarship criticizing *Leaman).*

Five years after *Leaman,* the Ohio Supreme Court decided *Conley v. Shearer,* 595 N.E.2d 862 (Ohio 1992). There, the plaintiff, Conley, brought suit in the Court of Common Pleas asserting state-law claims and a § 1983 claim against an agent of the Ohio Bureau of Criminal Identification and Investigation. *Id.* at 863-64. The trial court dismissed the action, finding that Conley had failed to comply with OHIO REV. CODE ANN. § 2743.02(F), which requires a plaintiff to seek a preliminary determination by the Court of Claims that a state official acted *ultra vires* before the plaintiff may bring suit against the official in the Court of Common Pleas. *See id.* at 864-66. The Ohio Supreme Court upheld dismissal of Conley's state-law claims for

failure to comply with the § 2743.02(F) procedure. *Id.* at 866-69. But the *Conley* court reversed the dismissal of Conley's 42 U.S.C. § 1983 claim, which had also been dismissed by the trial court under § 2743.02(F). *Id.* at 869-70. In so holding, the *Conley* court stated broadly that "[OHIO REV. CODE ANN.] § 2743.02 and [OHIO REV. CODE ANN.] § 9.86 ... do not apply to claims brought under federal law" and suggested that state immunity defenses in general could not interfere with a plaintiff's right to bring a § 1983 action. *Id.* at 869. Because *Conley* did not directly deal with subsection (A) of § 2743.02, the question of whether § 2743.02(A)(1) is applicable to federal claims remains unsettled under Ohio law. On the one hand, there is the broad language in *Conley* suggesting that § 2743.02 as a whole is inapplicable to federal causes of action.[2] On the other hand, *Conley* may stand for the narrower proposition that a plaintiff need not first comply with the § 2743.02(F) procedure before bringing federal claims against a state official in the Court of Common Pleas.

In *Thomson v. Harmony,* 65 F.3d 1314 (6th Cir. 1995), *cert. denied,* 517 U.S. 1105 (1996), this court adopted the latter reading of *Conley* and therefore concluded that *Leaman* was not altered by the *Conley* decision. The *Thomson* court read *Conley* to mean only "that a claim under § 1983 may be brought directly in the Court of Common Pleas, and thus is not subject to Ohio Rev. Code § 2743.02(F)." *Thomson,* 65 F.3d at 1319. The court further explained that "[i]n essence, a plaintiff *may* sue the state under § 1983 in the Court

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[2] This is the reading pressed by Wrinn and the reading the district court believed was demanded by the language of *Conley.*

of Common Pleas instead of the Court of Claims, but if he chooses the latter, he is bound by his decision." *Id.* Because it read *Conley* as dealing only with subsection (F) of § 2743.02 and not with the other subsections of § 2743.02, the *Thomson* court concluded that *Conley* did not affect *Leaman's* holding that § 2743.02(A)(1) bars a plaintiff's federal action if he brings a related action in the Court of Claims. The court stated that:

> *Conley* does not alter the calculus where a party chooses to waive certain claims in order to gain access to the state's coffers via the Court of Claims; then, a plaintiff's decision to file in that forum mandates dismissal under § 2743.02*(A)(1)*, not § 2743.02(F).

*Thomson*, 65 F.3d at 1319.[3]

According to this court's interpretation of § 2743.02(A)(1) in *Leaman* and *Thomson*, therefore, a plaintiff waives all claims he may have against state officers, including federal claims, when he brings suit in the Court of Claims based on the same acts or omissions. If we were to decide the case before us without certifying this question to the Ohio Supreme Court, therefore, we would be bound by *Leaman* and *Thomson* to hold that all of Wrinn's claims against the

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[3] In dissent, Chief Judge Merritt argued that *Conley* stood for the broader proposition that § 2743.02 in its entirety does not apply to federal claims. *See Thomson*, 65 F.3d at 1322 (Merritt, J., dissenting) ("The Supreme Court of Ohio has now expressly agreed that federal claims are not waived as a matter of Ohio law, and we should simply admit our mistake in *Leaman* and not persist in it, as though we know more about Ohio law than the Ohio Supreme Court.").

OSHP officers are barred by § 2743.02(A)(1). *See, e.g., Plinton v. County ofSummit*, 540 F.3d 459, 463 (6th Cir. 2008).

However, the Supreme Court of Ohio has never directly ruled on the question of whether § 2743.02(A)(1) is applicable to federal claims. Our decisions in *Leaman* and *Thomson* remain speculation, or *Erie* guesses, about the meaning of § 2743.02(A)(1). As the U.S. Supreme Court has explained, "[s]peculation by a federal court about the meaning of a state statute in the absence of prior state court adjudication is particularly gratuitous when ... the state courts stand willing to address questions of state law on certification from a federal court." *Arizonans for Official English*, 520 U.S. at 79 (internal quotation marks omitted). Accordingly, we believe that the interests of judicial federalism and comity strongly favor certification of the question presented in this case.

**B. The Certified Question of State Law**

For the reasons explained above, we certify the following question of Ohio law to the Supreme Court of Ohio pursuant to Rule XVIII of the Rules of Practice of the Supreme Court of Ohio:

> Does OHIO REV. CODE ANN. § 2743.02(A)(1) require waiver of a party's federal causes of action against state officers or employees when that party files suit in the Ohio Court of Claims based on the same act or omission?

**C. The Information Required by Rule XVII**

Because this court is certifying a question to the Supreme Court of Ohio, we provide the following information in accord with Rule XVIII, § 2(A)-(E).

1. **Name of the case:** Please refer to the caption on page 1 of this order.

2. **Statement of facts:** Please refer to § I of this order for a full recitation of the pertinent facts and the circumstances from which the question of law arises. Please refer to § II.B of this order for a statement of the question of law to be answered.

3. **Name of each of the parties:**

   a. Plaintiff-Appellant: Eugene Wrinn, Jr.

   b. Defendants-Appellees: Daren Johnson, Ohio State Highway Patrol (Lima); G.K. Manley, Ohio State Highway Patrol (Lima); K.J. Koverman, Ohio State Highway Patrol (Lima).

   c. Other Defendants: John Does 1-5 (Ohio State Highway Patrol, Lima); City of Lima (Lima Municipal Center); Lima Police Department Officers Curt Hile, John Dunhain, Jr., Officer Douglass, Bev Leary, C. Stevenson, A. Cortes, J.G. Garlock, and John Does 6-10; Allen County; Allen County Sheriff's Office Officers Robert Tomasi, T. Myers, Daniel W. Beck, and John Does 11-15; John Does 16-20.

d. Interested Party: Ohio State Highway Patrol.

4. **Names, Addresses, and Telephone Numbers of Counsel for Each Party:**

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5. **Designation of Moving Party:** Although neither side has sought certification, we designate Plaintiff-Appellant Eugene Wrinn, Jr., as the moving party.

**E. Instructions to the Clerk**

In accordance with Rule XVIII, § 3 of the Rules of Practice of the Supreme Court of Ohio, Mr. Leonard Green, Clerk of the United States Court of Appeals for the Sixth Circuit, is hereby instructed to serve copies of this certification order upon counsel for the parties and to file this certification order under the seal of this court with the Supreme Court of Ohio, along with appropriate proof of service.

## III. CONCLUSION

For the reasons discussed above, we **CERTIFY** a question of state law to the Supreme Court of Ohio.

/s/ Karen Nelson Moore
Karen Nelson Moore
United States Court of Appeals
for the Sixth Circuit

[CERTIFICATE OF SERVICE OMITTED
FROM THIS APPENDIX]

## APPENDIX C

**IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO WESTERN DIVISION**

**Case No. 3: 06 CV 2188**

**[Filed August 13, 2007]**

EUGENE WRINN, JR., )
)
Plaintiff, )
)
-vs- )
)
DAREN JOHNSON, etc., et al., )
)
Defendant. )
)

MEMORANDUM OPINION

KATZ, J.

This matter is before the Court on the defendants' motions to dismiss (Doc. 2, 14, 22), the plaintiff's responses (Doc. 13, 17, 24) and the defendants' replies (Doc. 16, 18). This Court has jurisdiction pursuant to 18 U.S.C. § 1331.

## I. Background

Plaintiff Eugene Wrinn, Jr. brings this lawsuit under 42 U.S.C. § 1983 against Defendants Daren Johnson, G. K. Manley and K. J. Koverman of the Ohio State Highway Patrol, in addition to other law enforcement officers. Interested party, Ohio State Highway Patrol, moves the Court to dismiss this case because (1) Plaintiff is specifically barred from filing this § 1983 under Ohio Rev. Ann. § 2743.02(A) and (2) pursuant to Fed. R. Civ. P. 12(b)(6), Plaintiff fails to state a § 1983 claim against Defendant Koverman for which relief can be granted.

On September 11, 2006, Plaintiff filed the case before this Court. On September 13, 2006, Plaintiff filed a complaint in the Ohio Court of Claims regarding the same incident from which this lawsuit arises. That lawsuit named OSHP, Daren Johnson and G.K. Manley as defendants. In both lawsuits, Plaintiff alleges that on September 16, 2005, he was driving on Interstate Highway 75 when his car crashed head-on into a truck. Following the accident, Plaintiff alleges that Defendants Johnson and Manley used excessive force on him, causing injuries. Defendant Koverman is named because of his supervisory position over Defendants Johnson and Manley. Plaintiff alleges that the actions of Johnson, Manley and Koverman violated his rights under the U.S. Constitution and Ohio tort law.

## II. Standard of Review

No complaint shall be dismissed "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to

relief." *Conley v. Gibson*, 355 U.S. 41, 45, (1957); *see also Pfennig v. Household Credit Servs.*, 295 F.3d 522, 525-26 (6th Cir.2002) (citing *Bibbo v. Dean Witter Reynolds, Inc.*, 151 F.3d 559, 561 (6th Cir.1998)). When deciding a motion brought pursuant to Fed.R.Civ.P. 12(b)(6), the inquiry is essentially limited to the content of the complaint, although matters of public record, orders, items appearing in the record, and attached exhibits also may be taken into account. *Yanacos v. Lake County*, 953 F.Supp. 187, 191 (N.D.Ohio 1996). The Court's task is to determine not whether the complaining party will prevail on its claims, but whether it is entitled to offer evidence in support of those claims. *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974). The Court must accept all the allegations stated in the complaint as true, *Hishon v. King & Spalding*, 467 U.S. 69, 73, 81 (1984), while viewing the complaint in the light most favorable to the plaintiff. *Scheuer*, 416 U.S. at 236. A court, however, is "not bound to accept as true a legal conclusion couched as a factual allegation." *Papasan v. Allain*, 478 U.S. 265, 286 (1986).

**III. Discussion**

The Court is faced with a choice between following Sixth Circuit precedent and dismissing this case, or adhering to the statute as interpreted by the Ohio Supreme Court and allowing the case to continue in this Court.

The Ohio Court of Claims Act ("O.C.C.A."), Ohio Rev. Code § 2743.02(A) provides the following:

> Except in the case of a civil action filed by the state, filing a civil action in the court of claims

> results in a complete waiver of any cause of action, based on the same act or omission, which the filing party has against any officer or employee, as defined in section 109.36 of the Revised Code. The waiver shall be void if the court determines that the act or omission was manifestly outside the scope of the officer's or employee's office or employment or that the officer or employee acted with malicious purpose, in bad faith, or in a wanton or reckless manner.

The Sixth Circuit has held, en banc, and reiterated more than once, that a claim cannot be brought in federal court if it is also brought in the Ohio Court of Claims. *Leaman v. Ohio Dep't of Mental Retardation*, 825 F.2d 946 (6th Cir.1987) (en banc) ("Where a claimant elects to sue the state in the Court of Claims, in other words, the state's employees are given an affirmative defense which the federal court has both the jurisdiction and the duty to recognize."); *Thomson v. Harmony*, 65 F.3d 1314 (6th Cir.1995); *Portis v. State of Ohio*, 141 F.3d 632, 633-34 (6th Cir.1998) (applying *Leaman*).

The Ohio Supreme Court has ruled that the O.C.C.A. only applies to state law claims and does not apply to bar federal claims that arise from the same set of facts as a claim brought in the Ohio Court of Claims. *Conley v. Shearer*, 64 Ohio St.3d 284, 292-93 (Ohio 1992). "Those sections, however, do not apply to claims brought under federal law. R.C. 9.86 expressly limits its coverage to 'any civil action that arises under the law of this state * * *.'" *Id.* "Moreover, the United States Supreme Court has concluded that '[c]onduct by persons acting under color of state law which is

wrongful under 42 U.S.C. § 1983 or § 1985(3) cannot be immunized by state law,' 'even though the federal cause of action [was] being asserted in the state courts.'" *Id.* (citing *Howlett v. Rose*, 496 U.S. 356, 376 (1990)). "Similarly, federal courts in Ohio have concluded that R.C. 9.86 and 2743.02(F) do not apply to Section 1983 claims even when such claims are pursued in state court." *Id.*

As recently as 1998, the Sixth Circuit has held that "where a federal court plaintiff files a related action in the Court of Claims, she has waived her right to sue the state officials for monetary damages in federal court." *Turker* at 459. The Circuit also acknowledged that, "[a]lthough this portion of *Leaman* produced six dissenters, and has been the target of much scholarly criticism, [footnote omitted] it remains the law of this circuit." *Id.* at 457. "The prior decision remains controlling authority unless an inconsistent decision of the United States Supreme Court requires modification of the decision or this Court sitting en banc overrules the prior decision."[1] *Id.* at 457-58.

However, the Court also noted that there may be other language in the statute that could affect how a case fares in federal court, side-stepping the issue of waiver. Basically, the Circuit noted that if the Court of Claims finds that the state employees acted "outside the scope of their employment, or with a malicious purpose, in bad faith or in a wanton or reckless

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[1] Indeed, it was a dissenter of the en banc *Leaman* decision who authored the panel's opinion in *Turker*. This demonstrates the impact and authority of an en banc decision.

manner," then the waiver would not apply and the case could proceed in federal court.

> We must make one addendum to the above discussion. Ohio has created a limited exception to the rule that state employees may not be sued in their official capacities. As set forth in § 2743.02(A)(1), Ohio state employees can be sued for damages in their official capacities if their actions were "manifestly outside the scope of [their] office or employment or [they] acted with malicious purpose, in bad faith, or in a wanton and reckless manner." The determination of whether a state employee's actions were ultra vires or malicious is to be made exclusively by the Ohio Court of Claims. *See* Ohio Rev.Code § 2743.02(F); *Thomson*, 65 F.3d at 1318 n. 3; *Haynes v. Marshall*, 887 F.2d 700, 704 (6th Cir.1989).
> The district court noted that at the time it was considering the motion to dismiss, the Ohio Court of Claims had not yet determined whether the defendants' alleged actions were taken outside the scope of their employment, or with a malicious purpose, in bad faith or in a wanton or reckless manner. Should the Ohio Court of Claims so find, then the district court (as it held) must reinstate Turker's claims as if no waiver had ever occurred.

*Id.* at 458.

This Court is faced with a clear contradiction of interpretation between two courts the precedents of

which it is bound to respect.[2] It is well established that the highest court of a state is the ultimate authority on the construction of statutes of that state. *Johnson v. Fankell*, 520 U.S. 911, 916 (1997). The Supreme Court of Ohio has interpreted the O.C.C.A. language at issue here as being inapplicable to federal causes of action.

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[2] The Court is aware of another Circuit opinion that has interpreted the O.C.C.A. language at issue. In *Tweed v. Wilkinson*, a three-judge panel of the Circuit wrote that "[*Leaman* implied] that a waiver occurs only if the plaintiff has pursued an Ohio Court of Claims case to the point of a judgment on the merits." 1998 U.S. App. LEXIS 8535 at *4 (6th Cir. 1998) (citing *Leaman*, 825 F.2d at 955). *Tweed* was decided on April 29, 1998, mere months before *Turker* was decided on October 5, 1998. *Turker* is the more recent opinion of the two.

Further, the Court notes that the portion of *Leaman* which the *Tweed* court cited appears to have been made in the course of drawing an analogy between the O.C.C.A. and the Federal Tort Claims Act and other laws that create a waiver of claims against the *federal* government in exchange for some other remedy.

> If that provision of federal law [the Federal Tort Claims Act] does not sully the skirts of justice with the detritus of the marketplace, neither does the waiver provision of the Ohio Court of Claims Act. . . . [O]ne who does not pursue his remedies against the federal government is not required to give up any claim he may have against the federal government's servants; but one who pursues his statutory remedies against the United States to the point of judgment-- even an adverse judgment or a judgment for only a small part of the amount claimed -- bars himself from any recovery against federal employees.

*Leaman*, 825 F.2d at 955.

Finally, the Court notes again the language in *Turker* with regard to adhering to *Leaman*: "[*Leaman*] remains controlling authority unless an inconsistent decision of the United States Supreme Court requires modification of the decision or this Court sitting en banc overrules the prior decision." *Turker*, 157 F.3d at 457-58.

In other words, a plaintiff may file and maintain causes of action arising from the same facts in both the Ohio Court of Claims and this Court. *Conley*, supra. However, the Sixth Circuit, both before and after the Ohio Supreme Court's ruling in *Conley* in 1992, has interpreted the O.C.C.A. language as requiring a complete waiver of all claims, including federal claims, upon the filing of a similar complaint in the Ohio Court of Claims. *See Leaman*, supra (1987) (en banc) and *Turker*, supra (1998). The *Turker* court, in citing *Conley*, considered itself "precluded from departing from *Leaman* and *Thomson*'s holdings. That can only be done by an en banc [Sixth Circuit]. Of course, such a course of action remains open to both Turker and the defendants." *Turker*, 157 F.3d at 460.

It appears incongruous to this Court that such disparate interpretations could persist between the Ohio Supreme Court and the U.S. Court of Appeals for the Sixth Circuit, given the traditional deference of federal courts to the construction of state statutes by the highest state court. The court that has issued the more recent decision, and the one to which the decisions of this Court are subject to appeal, is the federal appeals court. As the *Tucker* court noted, only that court, sitting en banc, can overturn its decision in *Leaman* and align itself with the Ohio Supreme Court on this issue. This Court is therefore bound to follow *Tucker* in spite of the divergence of interpretations.[3]

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[3] The Court, however, also notes that this issue might be appropriate for the parties to at least consider resolving via appeal to the U.S. Court of Appeals for the Sixth Circuit and encourages the parties to do so. If the Circuit chooses to overrule *Leaman* and its progeny, then this case will take on a different light. If the Circuit confirms its prior opinions, then this decision

Finally, the Court notes that, should the Ohio Court of Claims find liability against the defendants in that case, and further determine that the defendants acted "outside the scope of their employment, or with a malicious purpose, in bad faith or in a wanton or reckless manner," then this Court would appear to be bound to grant reinstatement of the underlying matter before it. Ohio Rev. Code § 2743.02(A); *Turker*, 157 F.3d at 458.

**Conclusion**

For the reasons described herein, the defendants' motions to dismiss (Doc. 2, 14, 22) are hereby granted.

IT IS SO ORDERED.

*s/ David A. Katz*
DAVID A. KATZ
U. S. DISTRICT JUDGE

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will remain in force with regard to that issue. This Court will follow the Circuit's precedent and not speculate on the potentiality of such a situation, except the foregoing.

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE NORTHERN DISTRICT OF OHIO**
**WESTERN DIVISION**

**Case No. 3: 06 CV 2188**

**[Filed August 13, 2007]**

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| EUGENE WRINN, JR., | ) |
| | ) |
| Plaintiff, | ) |
| | ) |
| -vs- | ) |
| | ) |
| DAREN JOHNSON, etc., et al., | ) |
| | ) |
| Defendant. | ) |
| | ) |

JUDGMENT ENTRY

KATZ, J.

For the reasons stated in the Memorandum Opinion filed contemporaneously with this entry, IT IS HEREBY ORDERED, ADJUDGED and DECREED that Defendants' motions to dismiss (Doc. 2, 14, 22) are granted.

*S/ David A. Katz*
DAVID A. KATZ
U. S. DISTRICT JUDGE

## APPENDIX D

## UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

**No. 07-4354**

**[Filed May 20, 2009]**

| | |
|---|---|
| EUGENE WRINN, JR., | ) |
| | ) |
| Plaintiff-Appellant, | ) |
| | ) |
| v. | ) |
| | ) |
| DAREN JOHNSON, OHIO HIGHWAY PATROL, (LIMA), ET AL., | ) |
| | ) |
| Defendants-Appellees, | ) |
| | ) |
| CITY OF LIMA, LIMA MUNICIPAL CENTER, ET AL., | ) |
| | ) |
| Defendants. | ) |

ORDER

**BEFORE:** DAUGHTREY and MOORE, Circuit Judges; and GRAHAM,* District Judge.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

**ENTERED BY ORDER OF THE COURT**

/s/ Leonard Green
Leonard Green
Clerk

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* Hon. James L. Graham, United States District Judge for the Southern District of Ohio, sitting by designation.

## APPENDIX E

**IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO WESTERN DIVISION**

**Case No. 3: 06 CV 2188**

**[Filed September 20, 2007]**

| | |
|---|---|
| EUGENE WRINN, JR., | ) |
| | ) |
| Plaintiff, | ) |
| | ) |
| -vs- | ) |
| | ) |
| DAREN JOHNSON, etc., et al., | ) |
| | ) |
| Defendant. | ) |
| | ) |

MEMORANDUM OPINION AND ORDER

KATZ, J.

Plaintiff filed this action on September 11, 2006 alleging that Defendants used excessive force against him. Such claim was under 41 U.S.C. § 1983. Other claims were included in the complaint. On September 13, 2006 Plaintiff filed a cause of action against the Ohio State Highway Patrol in the Ohio Court of Claims. Also named were Sergeant Johnson and Trooper Manley as Defendants.

Thereafter, the Ohio State Highway Patrol filed a motion to dismiss in this Court on behalf of itself and Defendants Manley, Johnson and Koverman. That motion was based upon the waiver provision contained within Ohio Revised Code § 2743.02(A). Simply stated, that section holds that a plaintiff may sue the state under section 1983 in the Court of Common Pleas or a federal court instead of the Court of Claims, but if he should choose the Court of Claims he is bound by that decision and barred from filing in any other court. This Court issued a memorandum opinion and judgment on August 13, 2007 granting the motion to dismiss the state actors based upon the above noted section of the Ohio Revised Code. That decision was based upon the choice this Court made to follow Sixth Circuit precedent rather than precedent established by the Ohio Supreme Court which would appear to permit the case to continue before this Court as to those Defendants. The Sixth Circuit has held in an en banc decision, that a claim cannot be brought in federal court if it is also brought in the Ohio Court of Claims. *Leaman v. Ohio Dept. of Mental Retardation*, 825 F.2d 946 (6th Cir. 1987)(en banc); *Portis v. State of Ohio*, 141 F.3d 632 (6th Cir. 1998)(applying *Leaman*). Because those rulings by the Sixth Circuit appear to be at odds with those of the Ohio Supreme Court in interpreting this statute, this Court suggested to the parties that the matter be considered for intermediate appeal pursuant to either Fed. R. Civ. P. 54(b) of 28 U.S.C. § 1292(b). Plaintiff has filed a motion for interlocutory appeal certification or, alternatively, Rule 54(b) certification and related stay of further proceedings. (Doc. No. 36). That motion has been opposed by the Ohio State Highway Patrol, Sergeant Johnson, Trooper Manley and Lieutenant Koverman.

The remaining Defendants in this case include the Allen County Sheriffs' officers, Allen County, the Lima Police Department officers and the City of Lima; those claims arise out of the identical set of circumstances giving rise to the claim against the Ohio State Highway Patrol and its officers. Were this case to proceed against the Defendants currently before the Court it would entail discovery and subsequent consideration of dispositive motions and/or trial, all of which could have to be repeated if the appellate court determined that this Court improperly granted the motion to dismiss. Clearly, the first requirement under Rule 54(b) of an entry of final judgment as to one or more, but fewer than all of the claims of the parties has been accomplished. The operative facts which give rise to the claim against the dismissed Defendants and those still before the Court are not distinct but identical.

Rule 54(b) also requires that this Court make an express determination that there is no just reason for delay of appellate review. The Sixth Circuit set forth a "non-exhaustive list" of factors for a district court to consider in certifying a case for interlocutory appeal:

> (1) the relationship between the adjudicated and the unadjudicated claims; (2) the possibility that the need for review might or might no be mooted by future developments in the district court; (3) the possibility that the reviewing court [*9] might be obliged to consider the same issue a second time; (4) the presence or absence of a claim or counter claim which could result in set-off against the judgment sought to be made final; (5) miscellaneous factors such as delay, economic and solvency considerations,

> shortening th tie of trial, frivolity of competing claims, expense and the like. Depending upon the factors of the particular case, all or some of the above factors may bear upon the propriety of the trial court's discretion in certifying a judgment as final under Rule 54(b).

*Corrosioneering v. Thyssen Environmental Systems*, 807 F.2d 1279, 1283 (6th Cir. 1986)(quoting *Allis-Chambers Corp. Philadelphia Electric Co.*, 521 F.2d 360 (3d Cir. 1975)).

As this Court has stated in a previous similar instance, it is mindful of the Sixth Circuit's admonition that a Rule 54(b) appeal be limited to "infrequent harsh cases". There is little possibility that the claim against the dismissed Defendants would be mooted by any continuing action taken by this Court as to the remaining Defendants. It is also extremely clear that were this motion for intermediate appeal and stay not granted there would arise the distinct possibility of the remaining parties continuing, at significant cost, the litigation and the same having to be repeated again should the appeal by Plaintiff anticipated by the motion be successful. Additionally, to go forward without the dismissed Defendants and before a determination by the Sixth Circuit of the appropriateness of their dismissal would be a waste of judicial time and assets.

For the foregoing reasons, and in order to prevent inappropriate expenditure of litigants time and money as well as of judicial resources, Plaintiff's motion to pursue an intermediate appeal pursuant to Rule 54(b) is granted and the motion to stay further proceedings herein is granted (Doc. No. 36); such stay will continue

until the determination of the matter on appeal to the Sixth Circuit.

IT IS SO ORDERED.

*S/ David A. Katz*
DAVID A. KATZ
U. S. DISTRICT JUDGE

## APPENDIX F

## UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

**No. 07-4354**

**[Filed April 11, 2008]**

EUGENE WRINN, JR.,

Plaintiff-Appellant,

v.

DAREN JOHNSON, OHIO STATE HIGHWAY PATROL (LIMA), ET AL.,

Defendants-Appellees,

CITY OF LIMA, ET AL.,

Defendants.

ORDER

The court having received a petition for initial hearing en banc, and the petition having been circulated to all active judges of this court, and no judge of this court having favored the suggestion,

It is **ORDERED** that the petition be and hereby is denied.

**ENTERED BY ORDER OF THE COURT**

**/s /Leonard Green**
**Leonard Green, Clerk**

## APPENDIX G

## SUPREME COURT OF OHIO

**Case No. 2008-2209**

**[Filed January 28, 2009]**

| | |
|---|---|
| Eugene Wrinn, Jr. | ) |
| | ) |
| v. | ) |
| | ) |
| Daren Johnson, Ohio State Highway Patrol (Lima); G.K. Manley, Ohio State Highway Patrol (Lima); K.J. Koverman, Ohio State Highway Patrol (Lima), City of Lima, Lima Municipal Center, et al. | ) |

ENTRY

This cause came on before the Court on the certification of a state law question from the U.S. District Court of Appeals for the Sixth Circuit. Upon consideration of respondents' motion to dismiss for lack of prosecution,

It is ordered by the Court that the motion to dismiss is granted. Accordingly, this cause is dismissed.

(U.S. District Court of Appeals for the Sixth Circuit; No. 074354)

THOMAS J. MOYER
Chief Justice

## APPENDIX H

**2743.02**
**TITLE [27] XXVII COURTS -- GENERAL PROVISIONS -- SPECIAL REMEDIES**
**CHAPTER 2743: COURT OF CLAIMS**

**2743.02 State waives immunity from liability.**

(A)(1) The state hereby waives its immunity from liability, except as provided for the office of the state fire marshal in division (G)(1) of section 9.60 and division (B) of section 3737.221 of the Revised Code and subject to division (H) of this section, and consents to be sued, and have its liability determined, in the court of claims created in this chapter in accordance with the same rules of law applicable to suits between private parties, except that the determination of liability is subject to the limitations set forth in this chapter and, in the case of state universities or colleges, in section 3345.40 of the Revised Code, and except as provided in division (A)(2) or (3) of this section. To the extent that the state has previously consented to be sued, this chapter has no applicability.

Except in the case of a civil action filed by the state, filing a civil action in the court of claims results in a complete waiver of any cause of action, based on the same act or omission, which the filing party has against any officer or employee, as defined in section 109.36 of the Revised Code. The waiver shall be void if the court determines that the act or omission was manifestly outside the scope of the officer's or

employee's office or employment or that the officer or employee acted with malicious purpose, in bad faith, or in a wanton or reckless manner.

(2) If a claimant proves in the court of claims that an officer or employee, as defined in section 109.36 of the Revised Code, would have personal liability for the officer's or employee's acts or omissions but for the fact that the officer or employee has personal immunity under section 9.86 of the Revised Code, the state shall be held liable in the court of claims in any action that is timely filed pursuant to section 2743.16 of the Revised Code and that is based upon the acts or omissions.

(3)(a) Except as provided in division (A)(3)(b) of this section, the state is immune from liability in any civil action or proceeding involving the performance or nonperformance of a public duty, including the performance or nonperformance of a public duty that is owed by the state in relation to any action of an individual who is committed to the custody of the state.

(b) The state immunity provided in division (A)(3)(a) of this section does not apply to any action of the state under circumstances in which a special relationship can be established between the state and an injured party. A special relationship under this division is demonstrated if all of the following elements exist:

(i) An assumption by the state, by means of promises or actions, of an affirmative duty to act on behalf of the party who was allegedly injured;

(ii) Knowledge on the part of the state's agents that inaction of the state could lead to harm;

(iii) Some form of direct contact between the state's agents and the injured party;

(iv) The injured party's justifiable reliance on the state's affirmative undertaking.

(B) The state hereby waives the immunity from liability of all hospitals owned or operated by one or more political subdivisions and consents for them to be sued, and to have their liability determined, in the court of common pleas, in accordance with the same rules of law applicable to suits between private parties, subject to the limitations set forth in this chapter. This division is also applicable to hospitals owned or operated by political subdivisions which have been determined by the supreme court to be subject to suit prior to July 28, 1975.

(C) Any hospital, as defined in section 2305.113 of the Revised Code, may purchase liability insurance covering its operations and activities and its agents, employees, nurses, interns, residents, staff, and members of the governing board and committees, and, whether or not such insurance is purchased, may, to such extent as its governing board considers appropriate, indemnify or agree to indemnify and hold harmless any such person against expense, including attorney's fees, damage, loss, or other liability arising out of, or claimed to have arisen out of, the death, disease, or injury of any person as a result of the negligence, malpractice, or other action or inaction of the indemnified person while acting within the scope of the indemnified person's duties or engaged in

activities at the request or direction, or for the benefit, of the hospital. Any hospital electing to indemnify such persons, or to agree to so indemnify, shall reserve such funds as are necessary, in the exercise of sound and prudent actuarial judgment, to cover the potential expense, fees, damage, loss, or other liability. The superintendent of insurance may recommend, or, if such hospital requests the superintendent to do so, the superintendent shall recommend, a specific amount for any period that, in the superintendent's opinion, represents such a judgment. This authority is in addition to any authorization otherwise provided or permitted by law.

(D) Recoveries against the state shall be reduced by the aggregate of insurance proceeds, disability award, or other collateral recovery received by the claimant. This division does not apply to civil actions in the court of claims against a state university or college under the circumstances described in section 3345.40 of the Revised Code. The collateral benefits provisions of division (B)(2) of that section apply under those circumstances.

(E) The only defendant in original actions in the court of claims is the state. The state may file a third-party complaint or counterclaim in any civil action, except a civil action for two thousand five hundred dollars or less, that is filed in the court of claims.

(F) A civil action against an officer or employee, as defined in section 109.36 of the Revised Code, that alleges that the officer's or employee's conduct was manifestly outside the scope of the officer's or employee's employment or official responsibilities, or that the officer or employee acted with malicious

purpose, in bad faith, or in a wanton or reckless manner shall first be filed against the state in the court of claims, which has exclusive, original jurisdiction to determine, initially, whether the officer or employee is entitled to personal immunity under section 9.86 of the Revised Code and whether the courts of common pleas have jurisdiction over the civil action. The officer or employee may participate in the immunity determination proceeding before the court of claims to determine whether the officer or employee is entitled to personal immunity under section 9.86 of the Revised Code.

The filing of a claim against an officer or employee under this division tolls the running of the applicable statute of limitations until the court of claims determines whether the officer or employee is entitled to personal immunity under section 9.86 of the Revised Code.

(G) Whenever a claim lies against an officer or employee who is a member of the Ohio national guard, and the officer or employee was, at the time of the act or omission complained of, subject to the "Federal Tort Claims Act," 60 Stat. 842 (1946), 28 U.S.C. 2671, et seq., then the Federal Tort Claims Act is the exclusive remedy of the claimant and the state has no liability under this section.

(H) If an inmate of a state correctional institution has a claim against the state for the loss of or damage to property and the amount claimed does not exceed three hundred dollars, before commencing an action against the state in the court of claims, the inmate shall file a claim for the loss or damage under the rules adopted by the director of rehabilitation and correction

pursuant to this division. The inmate shall file the claim within the time allowed for commencement of a civil action under section 2743.16 of the Revised Code. If the state admits or compromises the claim, the director shall make payment from a fund designated by the director for that purpose. If the state denies the claim or does not compromise the claim at least sixty days prior to expiration of the time allowed for commencement of a civil action based upon the loss or damage under section 2743.16 of the Revised Code, the inmate may commence an action in the court of claims under this chapter to recover damages for the loss or damage.

The director of rehabilitation and correction shall adopt rules pursuant to Chapter 119. of the Revised Code to implement this division.

Effective Date: 09-26-2003; 03-31-2005; 01-13-2005

## APPENDIX I

**64 Ohio St.3d 284**
**Conley v. Shearer**
**595 N.E.2d 862**

Conley, Appellant, v. Shearer, Appellee.

[Cite as Conley v. Shearer (1992), 64 Ohio St.3d 284]

Court of claims - R.C. 2745.02(F) does not violate the Equal Protection Clauses of the United States and Ohio Constitutions.

R.C. 2743.02(F) does not violate the Equal Protection Clauses of the United States and Ohio Constitutions.

(No. 91-1009-Submitted February 26, 1992 - Decided August 12, 1992.)

APPEAL from the Court of Appeals for Butler County, No. CA90-05-088.

On September 29, 1989, Dwayne Conley, appellant, filed a complaint in Butler County Common Pleas Court, alleging that Kurt Shearer, appellee, a Special Agent III employed by the Ohio Bureau of Criminal Identification and Investigation ("BCI"),(fn1) "maliciously, recklessly, wantonly, willfully and wrongfully identified and continued to maintain that [Conley] was the person who sold drugs." In addition to malicious prosecution, Conley alleged claims of defamation and a violation of Section 1983, Title 42,

U.S.Code. Criminal charges had been filed against Conley but were dismissed upon a showing that Shearer had incorrectly identified Conley as the person involved in the sale of drugs. Conley alleged that, as a result of Shearer's wrongdoing, he lost his job and incurred legal expenses. The complaint did not specify whether Conley was suing Shearer in his individual capacity or his official capacity as an employee of BCI, although it was Shearer's actions as a BCI agent which caused criminal charges to be filed against Conley. Neither the state of Ohio nor BCI was named as a defendant in the complaint.

The Attorney General's office filed a motion to dismiss on behalf of Shearer. The motion argued that the trial court was without subject matter jurisdiction based upon R.C. 2743.02(F), that Shearer was entitled to personal immunity under R.C. 9.86, and that the Court of Claims must initially make a determination with regard to immunity from suit before a court of common pleas could have jurisdiction over the action. After the parties had submitted memoranda but prior to the court's decision on the motion to dismiss, Conley filed an affidavit with the court expressly waiving any right he may have had to sue the state of Ohio because of his claims against Shearer. On April 16, 1990, the common pleas court dismissed the action. The court of appeals affirmed.

The cause is now before this court upon the allowance of a motion to certify the record.

Richard L. Hurchanik, for appellant.

Lee I. Fisher, Attorney General, Raul Rosado, Jr. and Simon B. Karas, for appellee.

MOYER, C.J.

The issue presented by this appeal is whether R.C. 2743.02(F) violates the Equal Protection Clauses of the United States and Ohio Constitutions. R.C. 2743.02(F) requires a plaintiff who potentially has a claim against the state as a result of a state employee's conduct to first file an action in the Court of Claims for an adjudication of whether the employee is entitled to immunity under R.C. 9.86. For the following reasons, we conclude that R.C. 2743.02(F) is constitutional under both the United States and Ohio Constitutions and, therefore, affirm the judgment of the court of appeals with regard to Conley's state-law claims. However, we reverse the court of appeals, judgment affirming the dismissal of Conley's Section 1983 claim.

Historically, immunity for government officials and employees was derived from the legal fiction that "[t]he King could do no wrong, so any mistake in judgment on the part of the King's officials was an act for which the government would take no responsibility." Civil Actions Against State Government, Its Divisions, Agencies and Officers (Winborne Ed.1982) 230, Section 6.2. This court held many years ago that the state and its officers were immune from tort and other liability for wrongs committed by agents of the state when acting in their official capacity. State v. Franklin Bank (1840), 10 Ohio 91, reversed on other grounds sub nom. Franklin Branch Bank v. Ohio (1862), 66 U.S. (1 Black) 474, 17 L.Ed. 180; Miers v. Zanesville & Maysville Turnpike Co. (1842), 11 Ohio 273.

In 1912, the Ohio Constitution was amended to allow actions to be brought against the state. That

amendment to the Constitution, Section 16, Article I, provides in part as follows: "Suits may be brought against the state, in such courts and in such manner, as may be provided by law." This provision was "not self-executing," and constituted only an authorization for subsequent statutes in which the General Assembly could grant its specific consent to be sued. Raudabaugh v. State (1917), 96 Ohio St. 513, 518, 118 N.E. 102, 103. Thus, in the absence of such consent, an action based on tort was not properly maintainable against the state or its officers or employees. Krause v. State (1972), 31 Ohio St.2d 132, 144, 60 O.O.2d 100, 106, 285 N.E.2d, 736, 743-744, appeal dismissed sub nom. Krause v. Ohio (1972), 409 U.S. 1052, 93 S.Ct. 557, 34 L.Ed.2d 506.

In 1975, the General Assembly enacted legislation creating the Court of Claims and specifying the forum and manner in which actions may be brought against the state and its officers and employees. R.C. 2743.01 to 2743.72. R.C. 2743.02(A)(1) provides the following:

"The state hereby waives its immunity from liability and consents to be sued, and have its liability determined, in the court of claims created in this chapter in accordance with the same rules of law applicable to suits between private parties, except that the determination of liability is subject to the limitations set forth in this chapter * * *. To the extent that the state has previously consented to be sued, this chapter has no applicability.

"Except in the case of a civil action filed by the state, filing a civil action in the court of claims results in a complete waiver of any cause of action, based on the same act or omission, which the filing party has

against any officer or employee, as defined in section 109.36 of the Revised Code. The waiver shall be void if the court determines that the act or omission was manifestly outside the scope of the officer's or employee's office or employment or that the officer or employee acted with malicious purpose, in bad faith, or in a wanton or reckless manner."

In Cooperman v. Univ. Surgical Assoc., Inc. (1987), 32 Ohio St.3d 191, 513 N.E.2d 288, paragraph two of the syllabus, we held that "[a] court of common pleas does not lack jurisdiction over an action against state officers or employees merely because the Court of Claims has not first determined that the act or omission, which is the subject of the action, was manifestly outside the scope of the officer's or employee's office or employment, or that the officer or employee acted with malicious purpose, in bad faith, or in a wanton or reckless manner, unless the aggrieved party has filed a suit in the Court of Claims based on the same act or omission. (R.C. 2743.02[A][1], construed and applied.)"

As a result of Cooperman, the General Assembly enacted R.C. 2743.02(F), which provides:

"A civil action against an officer or employee, as defined in section 109.36 of the Revised Code, that alleges that the officer's or employee's conduct was manifestly outside the scope of his employment or official responsibilities, or that the officer or employee acted with malicious purpose, in bad faith, or in a wanton or reckless manner shall first be filed against the state in the court of claims, which has exclusive, original jurisdiction to determine, initially, whether the officer or employee is entitled to personal

immunity under section 9.86 of the Revised Code and whether the courts of common pleas have jurisdiction over the civil action.

"The filing of a claim against an officer or employee under this division tolls the running of the applicable statute of limitations until the court of claims determines whether the officer or employee is entitled to personal immunity under section 9.86 of the Revised Code."

Thus, under the unambiguous terms of R.C. 2743.02, the Court of Claims has exclusive, original jurisdiction to determine whether a state employee is entitled to personal immunity under R.C. 9.86.

R.C. 9.86 states:

"Except for civil actions that arise out of the operation of a motor vehicle and civil actions in which the state is the plaintiff, no officer or employee shall be liable in any civil action that arises under the law of this state for damage or injury caused in the performance of his duties, unless the officer's or employee's actions were manifestly outside the scope of his employment or official responsibilities, or unless the officer or employee acted with malicious purpose, in bad faith, or in a wanton or reckless manner.

"This section does not eliminate, limit, or reduce any immunity from civil liability that is conferred upon an officer or employee by any other provision of the Revised Code or by case law. This section does not affect the liability of the state in an action filed against the state in the court of claims pursuant to Chapter 2743. of the Revised Code."

If the Court of Claims determines that the employee was acting within the scope of employment, in furtherance of the interests of the state, the state has agreed to accept responsibility for the employee's acts. R.C. 9.86 and 2743.02(A). In that event, only the state is subject to suit, and the litigation must be pursued in the Court of Claims. If the Court of Claims determines that the employee's acts did not further the interests of the state, i.e., the employee was acting outside the scope of his employment, maliciously, in bad faith, or in a wanton or reckless manner, the state has not agreed to accept responsibility for the employee's acts and the employee is personally answerable for his acts in a court of common pleas.

In a similar case recently decided by this court, we held that R.C. 2743.02(F) is a statute which "patently and unambiguously" takes away the common pleas court's original jurisdiction under R.C. 2305.01 in a specific class of cases. State ex rel. Sanquily v. Lucas Cty. Court of Common Pleas (1991), 60 Ohio St.3d 78, 80, 573 N.E.2d 606, 609. In Sanquily, this court allowed a writ of prohibition to prevent a court of common pleas from proceeding with an action against a state employee until the Court of Claims determined whether the employee was immune from suit. We concluded that "R.C. 2743.02(F) vests exclusive original jurisdiction in the Court of Claims to determine whether [an officer or employee of the state] is immune from suit. Until that court decides whether [the officer or employee] is immune, the common pleas court is totally without jurisdiction over the litigation against him." Id.

Although Conley has waived any claim he had against the state, Shearer is still entitled to any

immunity from suit that may exist. Such a rule bars plaintiffs with claims against state officers and employees from waiving claims against the state in the hope of maintaining an action against the officer or employee individually, thereby avoiding the jurisdictional prerequisite of R.C. 2743.02(F). Only after the Court of Claims determines that a state employee acted outside the scope of his or her employment or acted with malicious purpose, in bad faith, or in a wanton or reckless manner may a plaintiff bring an action against the employee in a court of common pleas. Tschantz v. Ferguson (1989), 49 Ohio App.3d 9, 12, 550 N.E.2d 544, 547, appeal dismissed (1991), 57 Ohio St.3d 131, 566 N.E.2d 655. If the Court of Claims finds that the employee was acting within the scope of employment and without malice, bad faith, or wantonness or recklessness, then the plaintiff may pursue the action against the state in the Court of Claims.

Conley argues that R.C. 2743.02(F) denies him equal protection of the laws because that statute requires him to first obtain a determination by the Court of Claims with regard to the potential immunity of Shearer; that this requirement forces him to incur the additional expense of a separate action in the Court of Claims; that if no claim exists against the state, the initiation of a lawsuit against the state in the Court of Claims is a useless act; and that there is no rational basis supporting R.C. 2743.02(F). Conley also asserts that the statute is unconstitutional because it deprives him of his right to a trial by jury.

"The equal protection of law implies that all litigants similarly situated may appeal to courts for both relief and defense under like conditions, with like

protection, and without discrimination." Sexton v. Barry (C.A.6, 1956), 233 F.2d 220, 224. "Equal protection of the law means the protection of equal laws. It does not preclude class legislation or class action provided there is a reasonable basis for such classification. The prohibition against the denial of equal protection of the laws requires that the law shall have an equality of operation on persons according to their relation. So long as the laws are applicable to all persons under like circumstances and do not subject individuals to an arbitrary exercise of power and operate alike upon all persons similarly situated, it suffices the constitutional prohibition against the denial of equal protection of the laws. Senior v. Ratterman [1887], 44 Ohio St. 661 [11 N.E. 321], Xenia v. Schmidt [1920], 101 Ohio St. 437 [130 N.E. 24]." Dayton v. Keys (1969), 21 Ohio Misc. 105, 114, 50 O.O.2d 29, 34, 252 N.E.2d 655, 660.

Conley argues that R.C. 2743.02(F) discriminates against him and others on the basis of wealth, in that the costs of litigating his claims are increased by requiring him first to seek a determination in the Court of Claims as to the immunity from suit of Shearer. As a result, he argues, R.C. 2743.02(F) violates the Equal Protection Clauses of both the United States and Ohio Constitutions.

We first note that, as a general rule, "[a]ll legislative enactments enjoy a presumption of constitutionality." Sedar v. Knowlton Constr. Co. (1990), 49 Ohio St.3d 193, 199, 551 N.E.2d 938, 944, citing Hardy v. VerMeulen (1987), 32 Ohio St.3d 45, 48, 512 N.E.2d 626, 629; State v. Dorso (1983), 4 Ohio St.3d 60, 61, 4 OBR 150, 151, 446 N.E.2d 449, 450; State ex rel. Dickman v. Defenbacher (1955), 164 Ohio

St. 142, 57 O.O. 134, 128 N.E.2d 59, paragraph one of the syllabus. Courts must apply all presumptions and germane rules of construction to uphold a challenged statute if at all possible. Sedar, supra, at 199, 551 N.E.2d at 944, citing Dorso, supra, 4 Ohio St.3d at 61, 4 OBR at 151, 446 N.E.2d at 450. Only if the unconstitutionality of a statute is shown beyond a reasonable doubt can the statute be declared invalid. Bd. of Edn. v. Walter (1979), 58 Ohio St.2d 368, 376, 12 O.O.3d 327, 332, 390 N.E.2d 813, 819.

The test used in determining whether a statute is constitutional under the Equal Protection Clause depends upon whether a fundamental interest or suspect class is involved. "Under the equal protection clause, in the absence of state action impinging on a fundamental interest or involving a suspect class, a rational basis analysis is normally used. Where the traditional rational basis test is used great deference is paid to the state, the only requirement being to show that the differential treatment is rationally related to some legitimate state interest." State ex rel. Heller v. Miller (1980), 61 Ohio St.2d 6, 11, 15 O.O.3d 3, 6, 399 N.E.2d 66, 69. See, also, Lyle Constr., Inc. v. Div. of Reclamation (1987), 34 Ohio St.3d 22, 516 N.E.2d 209. Where a fundamental interest or suspect class is at issue, a stricter test is used, Massachusetts Ed. of Retirement v. Murgia (1976), 427 U.S. 307, 96 S.Ct. 2562, 49 L.Ed.2d 520, and the government will have to demonstrate that a classification created by law is necessary to promote a compelling governmental interest. State ex rel. Brown v. Summit Cty. Bd. of Elections (1989), 46 Ohio St.3d 166, 168, 545 N.E.2d 1256, 1259.

Generally, classifications based upon wealth do not trigger any heightened scrutiny under an equal protection analysis, James v. Valtierra (1971), 402 U.S. 137, 91 S.Ct. 1331, 28 L.Ed.2d 678; San Antonio Ind. School Dist. v. Rodriguez (1973), 411 U.S. 1, 93 S.Ct. 1278, 36 L.Ed.2d 16; however, where fundamental rights are involved, a court will look more closely at laws which distinguish on the basis of wealth between those within and those outside a designated class. Boddie v. Connecticut (1971), 92 S.Ct. 780, 28 L.Ed.2d 113 (access to courts- -filing fee for divorce action); Smith v. Bennett (1961), 365 U.S. 708, 81 S.Ct. 895, 6 L.Ed.2d 39 (access to courts- -filing fee for application for writ of habeas corpus and appeal). See, also, Harper v. Virginia Bd, of Elections (1966), 383 U.S. 663, 668, 86 S.Ct. 1079, 1082, 16 L.Ed.2d 169, 173 ("Lines drawn on the basis of wealth or property, like those of race, * * * are traditionally disfavored."). As Conley raises his equal protection argument with respect to the right to sue in a civil action (access to courts), a fundamental right is arguably involved. Section 16, Article I of the Ohio Constitution (fn2); Boddie, supra; Smith, supra.

However, Conley has made no showing that R.C. 2743.02(F) creates an impermissible wealth-based classification on its face or in its application or effect. In fact, R.C. Chapter 2743 makes no classification on the basis of wealth at all. No line has been drawn between rich and poor by R.C. 2743.02(F). The Rules of the Court of Claims and the Local Rules of the Court of Claims permit an action to be filed by an indigent plaintiff without a filing fee, C.C.R. 2(B) and L.C.C.R. 3(B), and the action may be transferred to the plaintiff's home county for trial upon a showing of hardship and whenever justice dictates, R.C.

2743.03(B) and L.C.C.R. 5(.B). Contrary to his fears, Conley may pursue an action in the Court of Claims without incurring the expense of litigating in Columbus. Thus, Conley has not been foreclosed from access to the courts because of his alleged economic status.

As this court has previously held, where there is no classification, there is no discrimination which would offend the Equal Protection Clauses of either the United States or Ohio Constitutions. Krause, supra. See, also, Commonwealth v. Purdy (1990), 408 Mass. 681, 685, 562 N.E.2d 1347, 1350 (in the absence of a sufficient legal classification, equal protection analysis is not triggered). Additionally, Conley's argument fails as there is no fundamental right to sue the state or its employees. The state voluntarily consents to be sued and may qualify and draw perimeters around the granted right without violating equal protection. Grange Mut. Cas. Co. v. Columbus (1989), 49 Ohio App.3d 50, 52, 550 N.E.2d 524, 527.

Conley also attacks R.C. 2743.02 on equal protection grounds because the statute requires him to pursue an action in the Court of Claims as a condition precedent to an action in common pleas court against a state employee. He essentially asserts that R.C. 2743.02(F) violates the Equal Protection Clauses of both the United States and Ohio Constitutions by imposing a condition not present in a suit against other individuals. As no fundamental interest or suspect class is involved, we will apply the rational basis test. Lyle Constr., Inc., supra; see, also, State ex rel Heller v. Miller, supra. Applying that test, we conclude that R.C. 2743.02(F) is reasonable and does not violate equal protection of the laws. The statute

does not create an arbitrary limitation on litigation against state employees. The immunity-from-lawsuit provisions found in R.C. 2743.02(F) and 9.86 contribute to effective government by freeing state employees from the intimidation of vexatious litigation, the burden of defending lawsuits, and personal liability. As Judge Learned Hand noted in Gregoire v. Biddle (C.A.2, 1949), 177 F.2d 579, 581:

"The justification for * * * [immunity for public officials and employees] is that it is impossible to know whether the claim is well founded until the case has been tried, and that to submit all officials, the innocent as well as the guilty, to the burden of a trial and to the inevitable danger of its outcome, would dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties."

The United States Court of Appeals for the Third Circuit also noted public policy reasons supporting immunity for public officials, and indirectly all public employees, in Bauers v. Heisel (C.A.3, 1966), 361 F.2d 581, 590, fn. 9, certiorari denied (1966), 386 U.S. 1021, 87 S.Ct. 1367, 18 L.Ed.2d 457, quoting Note (1953), 66 Harv.L.Rev. 1285, 1295, fn. 54:

"'(1) the danger of influencing public officials by threat of a law suit; (2) the deterrent effect of potential liability on [people] * * * who are considering entering public life; (3) the drain on the valuable time of the official caused by insubstantial suits [which would require inordinate private record keeping * * *]; (4) the unfairness of subjecting officials to liability for the acts of their subordinates; (5) the theory that the official owes a duty to the public and not to the individual; (6)

the feeling that the ballot and the formal removal proceeding are more appropriate ways to enforce honesty and efficiency of public officers.'"

Further, as the court of appeals in this case noted, determination of immunity by the Court of Claims, in a single forum, "prevents the possibility of widely divergent interpretations of when R.C. 9.86 immunity applies." Therefore, because it is rationally related to a legitimate legislative purpose, we hold that R.C. 2743.02(F) does not violate the Equal Protection Clauses of the United States and Ohio Constitutions.

Conley further challenges R.C. 2743.02 as a violation of his right to a trial by jury. The question of whether Shearer is entitled to immunity as a governmental employee is a question of law for which there is no right to trial. A jury trial is necessary only when the case requires resolution of factual issues which are triable to a jury in comparable civil actions. See Erie Ins. Group v. Fisher (1984), 15 Ohio St.3d 380, 381-382, 15 OBR 497, 498-499, 474 N.E.2d 320, 322. See, also, R.C. 2311.04 and Civ.R. 56(C). "Whether immunity may be invoked is a purely legal issue, properly determined by the court prior to trial, Donta v. Hooper (C.A.6, 1985), 774 F.2d 716, 719, certiorari denied (1987), 483 U.S. 1019 [107 S.Ct. 3261, 97 L.Ed.2d 760], and preferably on a motion for summary judgment." Roe v. Hamilton Cty. Dept. of Human Serv. (1988), 53 Ohio App.3d 120, 126, 560 N.E.2d 238, 243.

If the Court of Claims determines that a state employee was acting outside the scope of employment and, therefore, is personally responsible for his or her acts and is subject to suit in a common pleas court, the

plaintiff and the state employee retain the right to have a jury hear and determine all factual issues presented at trial. Thus, any right to a jury trial which Conley may have had was not infringed by the procedure found in R.C. 2743.02(F). Alternatively, because R.C. 2743.02(F) is procedural in nature, it does not violate any substantive rights, including the right to a trial by jury. Shew v. Greene (Apr. 24, 1989), Warren App. No. CA88-09-070, unreported, 1989 WL 38943.

Finally, we address an issue not expressly raised by Conley, but which is evident from the record and constitutes plain error: dismissal of his claim under Section 1983, Title 42, U.S.Code. A cause of action under Section 1983 must allege that a person, acting "under color of law," deprived the plaintiff of a constitutionally guaranteed federal right. Cooperman, supra. The trial court dismissed Conley's Section 1983 claim on the same grounds as his other claims, i.e., lack of subject matter jurisdiction pursuant to R.C. 2743.02 and R.C. 9.86. Those sections, however, do not apply to claims brought under federal law. R.C. 9.86 expressly limits its coverage to "any civil action that arises under the law of this state (Emphasis added.)* * *"

Moreover, the United States Supreme Court has concluded that ""'[c]onduct by persons acting under color of state law which is wrongful under 42 U.S.C. 1983 or 1985(3) cannot be immunized by state law,'"" "'even though the federal cause of action [was] being asserted in the state courts.'" Howlett v. Rose (1990), 496 U.S. 356, 376, 110 S.Ct. 2430, 2443, 110 L.Ed.2d 332, 353, quoting Martinez v. California (1980), 444 U.S. 277, 284, 100 S.Ct. 553, 558, 62 L.Ed.2d 481, 488,

and at fn. 8. The court in Howlett continued, "'[a] construction of [Section 1983 or 1985(3)] which permit[s] a state immunity defense to have controlling effect would transmute a basic guarantee into an illusory promise; and the supremacy clause of the Constitution insures that the proper construction may be enforced.'" Id. Similarly, federal courts in Ohio have concluded that R.C. 9.86 and 2743.02(F) do not apply to Section 1983 claims even when such claims are pursued in state court. Haynes v. Marshall (C.A.6, 1989), 887 F.2d 700; Evans v. Celeste (S.D.Ohio 1989), 718 F.Supp. 641; see, also, Parks v. Wilkins (S.D.Ohio 1988),716 F. Supp. 1028. Further, we have previously held that a court of common pleas has jurisdiction to hear claims brought under Section 1983 against the state and officers and employees of the state. Schwarz v. Ohio State Univ. Bd. of Trustees (1987), 31 Ohio St.3d 267, 31 OBR 493, 510 N.E.2d 808.

Because it was not necessary for Conley to comply with the requirements of R.C. 2743.02 in bringing his Section 1983 claim, a federal law claim, we find that it was plain error for the trial court to dismiss his claim on those grounds. See Calmes v. Goodyear Tire & Rubber Co. (1991), 61 Ohio St.3d 470, 475, 575 N.E.2d 416, 420, fn. 3; O'Connell v. Chesapeake & Ohio RR. Co. (1991), 58 Ohio St.3d 226, 229-230, 569 N.E.2d 889, 892-893. Therefore, we remand that claim to the trial court for further proceedings consistent with this opinion.

Accordingly, for all the foregoing reasons, we affirm the court of appeals' judgment in part, reverse it in part, and remand the cause to the trial court.

Judgment affirmed in part,
reversed in part
and cause remanded.

SWEENEY, HOLMES, DOUGLAS, WRIGHT, H. BROWN and RESNICK, JJ., concur.

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Footnotes:

1 The Bureau of Criminal Identification and Investigation is a subdivision of the Ohio Attorney General's office, an official agency of the state of Ohio. R.C. 109.51.

2 Section 16, Article I of the Ohio Constitution provides:

"All courts shall be open, and every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law, and shall have justice administered without denial or delay.

"Suits may be brought against the state, in such courts and in such manner, as may be provided by law."

## APPENDIX J

**UNITED STATES DISTRICT COURT**
**FOR THE NORTHERN DISTRICT OF OHIO**
**WESTERN DIVISION**

**Case No. 06-2188**

**[Filed September 11, 2006]**

EUGENE WRINN, JR.
1945 Weatherhead Hollow Rd.
Guilford, Vermont 05301

Plaintiff

vs.

DAREN JOHNSON
Ohio State Highway Patrol
Lima Patrol Post
2005 East Fourth St.
Lima, OH 45804

G. K. MANLEY
Ohio State Highway Patrol
Lima Patrol Post
2005 East Fourth St.
Lima, OH 45804

K. J. KOVERMAN
Ohio State Highway Patrol
Lima Patrol Post

2005 East Fourth St. )
Lima, OH 45804 )
)
JOHN DOES 1-5 )
Ohio State Highway Patrol )
Lima Patrol Post )
2005 East Fourth St. )
Lima, OH 45804 )
)
CITY OF LIMA )
Lima Municipal Center )
50 Town Square )
Lima, OH 45801 )
)
CURT HILE )
Lima Police Department )
117 E. Market Street )
Lima, OH 45801 )
)
JOHN DUNHAM, JR. )
Lima Police Department )
117 E. Market Street )
Lima, OH 45801 )
)
OFFICER DOUGLASS )
Lima Police Department )
117 E. Market Street )
Lima, OH 45801 )
)
BEV LEARY )
Lima Police Department )
117 E. Market Street )
Lima, OH 45801 )
)
C. STEVENSON )
Lima Police Department )

117 E. Market Street )
Lima, OH 45801 )
)
A. Cortes )
Lima Police Department )
117 E. Market Street )
Lima, OH 45801 )
)
J. G. GARLOCK )
Lima Police Department )
117 E. Market Street )
Lima, OH 45801 )
)
JOHN DOES 6-10 )
Lima Police Department )
117 E. Market Street )
Lima, OH 45801 )
)
ALLEN COUNTY )
Allen County Courthouse )
301 North Main St. )
PO Box 1243 )
Lima, Ohio 45802 )
)
ROBERT TOMASI )
Allen County Sheriff's Office )
333 N. Main St. )
Lima, OH 45802 )
)
T. MYERS )
Allen County Sheriff's Office )
333 N. Main St. )
Lima, OH 45802 )
)
DANIEL W. BECK )
Allen County Sheriff's Office )

333 N. Main St. )
Lima, OH 45802 )
)
JOHN DOES 11-15 )
Allen County Sheriff's Office )
333 N. Main St. )
Lima, OH 45802 )
)
JOHN DOES 16-20 )
)
Defendants. )
_____ )

**COMPLAINT WITH JURY DEMAND**

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Counsel for Plaintiff

## I. INTRODUCTION.

1. This action includes claims for civil rights violations under 42 U.S.C. § 1983 and claims for intentional torts under state law. These claims are based on the actions of certain law enforcement officers who responded to the scene of a motor vehicle crash in which the plaintiff was severely injured. Instead of rendering assistance to the plaintiff, the officers falsely arrested plaintiff and used excessive force against him in violation the United States Constitution and state law.

## II. JURISDICTION AND VENUE.

2. Pursuant to 28 U.S.C. §§ 1331 and 1343, the United States District Court has jurisdiction over the claims arising under 42 U.S.C. § 1983 and the United States Constitution. Pursuant to 28 U.S.C. § 1332, the United States District Court has jurisdiction over the claims arising under state law. The Plaintiff is a resident of Vermont. All Defendants are residents of Ohio. The amount in controversy exceeds $75,000.00. Proper venue lies in the Northern District of Ohio pursuant to 28 U.S.C. § 1391.

## III. PARTIES.

3. Plaintiff Eugene Wrinn, Jr., is a United States citizen and a resident of Vermont.

4. Defendant Daren Johnson was a Sergeant for the Ohio State Highway Patrol at all times relevant to this action.

5. Defendant G.K. Manley was a Trooper with the Ohio State Highway Patrol at all times relevant to this action.

6. Defendant K.J. Koverman was a Lieutenant for the Ohio State Highway Patrol at all times relevant to this action.

7. Defendants John Doe 1-5 were law enforcement officers for the Ohio State Highway Patrol at all times relevant to this action. At present, their names and identities are unknown, but once discovered, they may be substituted as party-defendants.

8. Defendant City of Lima is chartered municipality, organized and existing under the laws of the State of Ohio.

9. Defendant Curt Hile was a Patrolman for the City of Lima Police Department at all times relevant to this action.

10. Defendant John Dunham Jr. was a Patrolman for the City of Lima Police Department at all times relevant to this action.

11. Defendant Officer Douglass was a Patrolman for the City of Lima Police Department at all times relevant to this action.

12. Defendant Bev Leary was a Sergeant for the City of Lima Police Department at all times relevant to this action.

13. Defendant C. Stevenson was a Sergeant for the City of Lima Police Department at all times relevant to this action.

14. Defendant A. Cortes was a Lieutenant for the City of Lima Police Department at all times relevant to this action.

15. Defendant J.G. Garlock was Chief of Police for the City of Lima Police Department at all times relevant to this action.

16. Defendants John Doe 6-10 were law enforcement officers for the City of Lima Police Department at all times relevant to this action. At present, their names and identities are unknown, but once discovered, they may be substituted as party-defendants.

17. Defendant Allen County is a political subdivision of the State of Ohio.

18. Defendant Robert Tomasi was a Deputy Sheriff for the Allen County Sheriff's Office at all times relevant to this action.

19. Defendant T. Myers was a Lieutenant for the Allen County Sheriff's Office at all times relevant to this action.

20. Defendant Daniel W. Beck was the Sheriff of Allen County at all times relevant to this action.

21. Defendants John Doe 11-15 were law enforcement officers for the Allen County Sheriff's Office at all times relevant to this action. At present,

their names and identities are unknown, but once discovered, they may be substituted as party-defendants.

22. Defendants John Doe 16-20 are other individuals. At present, their names and identities are unknown, but once discovered, they may be substituted as party-defendants.

23. Defendants Garlock, Cortes, Hile, Dunham, Douglass, Leary, Stevenson, Beck, Myers, and Tomasi are being sued in both their official capacities and their individual capacities.

24. Defendants Koverman, Johnson, and Manley are being sued in their individual capacities only.

**IV. FACTS.**

25. On September 16, 2005 at approximately 2:00 AM, the plaintiff, Eugene Wrinn, Jr. ("Wrinn") was driving his vehicle in Allen County, Ohio. As Wrinn merged into the northbound lanes of Interstate 75 ("I-75") near State Route 309, Wrinn lost control of his vehicle due to heavy rain. His vehicle came to rest facing southbound in the northbound lanes of I-75. The vehicle stalled and Wrinn was unable to restart the vehicle in time to avoid being struck head-on by a tractor-trailer that was traveling northbound on I-75.

26. Wrinn and his two passengers suffered injuries as a result of the crash.

27. Wrinn suffered a head injury and lost consciousness.

28. Defendant, Sergeant Daren L. Johnson ("Sgt. Johnson") of the Ohio State Highway Patrol was the first law enforcement officer to arrive on the scene. When Sgt. Johnson arrived on the scene, Wrinn was still slumped over in the driver's seat of the vehicle.

29. As Sgt. Johnson approached the vehicle, Wrinn started to regain consciousness and attempted to exit the vehicle. Sgt. Johnson told Wrinn to remain in the vehicle.

30. Due to his head injury, Wrinn was disoriented and unable to comprehend Sgt. Johnson's instructions.

31. Still disoriented, Wrinn attempted to walk away from the vehicle.

32. Although Wrinn attempted to walk away from Sgt. Johnson, Wrinn did not act in a menacing or threatening manner toward Sgt. Johnson or anyone at scene of the crash.

33. Sgt. Johnson grabbed Wrinn in an attempt to prevent him from walking away. Wrinn pulled away from Sgt. Johnson and a struggle ensued.

34. Sgt. Johnson used excessive force in the struggle with Wrinn.

35. Sgt. Johnson knew that Wrinn had been injured in a motor vehicle crash.

36. Even knowing Wrinn was already injured, Sgt. Johnson struck Wrinn several times with flashlight using an overhand swing.

37. At least one of the strikes impacted the back of Wrinn's head causing severe injuries including a large laceration.

38. After being struck with the flashlight, Wrinn attempted walk away from Sgt. Johnson. Sgt. Johnson then cycled his Taser on Wrinn's back, causing Wrinn to fall to the ground.

39. Still disoriented, Wrinn attempted to walk away again but Sgt. Johnson kicked Wrinn in the back of the legs causing Wrinn to fall to the ground again.

40. When Trooper G.K. Manley of the Ohio State Highway Patrol arrived, he and Sgt. Johnson forcefully took Wrinn to the ground and attempted to handcuff Wrinn.

41. Other law enforcement officers from the Ohio State Highway Patrol, the Allen County Sheriff's Office, and the Lima Police Department arrived on the scene and assisted Sgt. Johnson and Trooper Manley with handcuffing Wrinn, who was prone on the ground writhing in pain.

42. Even though Wrinn was obviously injured and in severe pain, some of the law enforcement officers on the scene used excessive force in handcuffing Wrinn.

43. Officer Hile of the Lima Police Department knelt beside Wrinn and delivered approximately twelve (12) knee strikes to Wrinn's thorax and abdomen while Wrinn yelled in pain with each strike.

44. After delivering the knee strikes, Officer Hile got up and walked around to Wrinn's head and proceeded to step on Wrinn's head and push Wrinn's head into the pavement with his foot.

45. Additionally, Officer Dunham of the Lima Police Department cycled his Taser twice in back of Wrinn's neck while Wrinn was on the ground.

46. Trooper Manley struck Wrinn with a flashlight several times.

47. Deputy Robert Tomasi of the Allen County Sheriff's Office sprayed Wrinn with pepper spray.

48. Sgt. Johnson requested that the emergency medical personnel at the scene give Wrinn something to "knock him out." The emergency medical personnel then injected Wrinn with medication.

49. Wrinn was handcuffed and his legs were secured with a tow strap from one of the patrol cars. Wrinn was then transported to the Lima Memorial Hospital.

50. As a result of this incident, Wrinn was hospitalized for approximately five days and received other medical treatment. He was treated for several injuries including the trauma to his head. Numerous staples were required to close the large lacerations on his head. Wrinn's injuries also included several cuts and bruises on his wrists from the handcuffs. Wrinn incurred medical expenses in excess of $30,000.00

51. As a direct and proximate result of the Defendants' actions, Wrinn suffered severe,

debilitating, and permanent physical and mental injuries. He is expected to receive additional treatment for these injuries in the future.

52. As a direct and proximate result of the Defendants' actions, Wrinn lost wages, he is expected to lose additional wages in the future, and his earning capacity has been harmed.

53. As a direct and proximate result of this incident, Wrinn endured substantial pain and suffering and will continue to endure pain and suffering in the future.

54. As a direct and proximate result of this incident, Wrinn suffered extreme emotional distress and will continue to suffer extreme emotional distress in the future.

55. Wrinn received a traffic citation for failure to control but has not received any criminal charges related to this incident.

**FIRST CAUSE OF ACTION**
**Against Defendants Johnson and Manley**
**(42 U.S.C. § 1983)**
**(Violation of Civil Rights by False Arrest)**

56. Plaintiff incorporates herein by reference the allegations contained in paragraphs 1 through 55.

57. Defendants Sgt. Johnson and Trooper Manley responded to a motor vehicle crash in which Wrinn was severely injured. Wrinn had committed the traffic violation of failure to control but had not committed any crime.

58. Acting under color of state law, Defendants Johnson and Manley arrested Wrinn without probable cause.

59. Such false arrest deprived Wrinn of his constitutional rights including his right to be free from an unreasonable seizure as guaranteed by the Fourth and Fourteenth Amendments to the United States Constitution.

60. As a direct and proximate result of the above, Wrinn suffered severe physical and mental injuries for which Defendants Johnson and Manley are liable.

**SECOND CAUSE OF ACTION**
**Against Defendants Johnson, Manley, Hile, Dunham, Douglass, Tomasi, and John Does 1-20**
**(42 U.S.C. § 1983)**
**(Violation of Civil Rights by Excessive Force)**

61. Plaintiff incorporates herein by reference the allegations contained in paragraphs 1 through 60.

62. Defendants Johnson, Manley, Hile, Dunham, Douglass, Tomasi, and John Does 1-20 knew or should have known that Wrinn had suffered severe injuries in the motor vehicle crash.

63. Acting under color of state law, Defendants Johnson, Manley, Hile, Dunham, Douglass, Tomasi, and John Does 1-20 used excessive force in arresting Wrinn.

64. The specific acts which constituted excessive force include, but are not limited to, the following:

(a) Defendant Johnson struck Wrinn in the back of the head with a flashlight;

(b) Defendant Johnson cycled his Taser on Wrinn's back;

(c) Defendant Johnson kicked Wrinn and forcibly took Wrinn to the ground;

(d) Defendant Manley struck Wrinn in the legs with a flashlight;

(e) Defendant Manley forcibly took Wrinn to the ground;

(f) Defendant Hile delivered approximately twelve knee strikes to Wrinn's abdomen and thorax;

(g) Defendant Hile stepped on Wrinn's head and pushed Wrinn's head into the pavement with his foot;

(h) Defendant Dunham cycled his Taser twice on the back of Wrinn's neck; and

(i) Defendants John Does 1-20 applied the handcuffs on Wrinn's wrists in such a manner as to cause lacerations and bruising

65. Such excessive force deprived Wrinn of his constitutional rights including his right to be free from unreasonable seizure as guaranteed by the Fourth and Fourteenth Amendments to the United States Constitution.

66. As a direct and proximate result of the above, Wrinn suffered severe physical and mental injuries for which Defendants Johnson, Manley, Hile, Dunham, Douglass, Tomasi and John Does 1-20 are liable.

**THIRD CAUSE OF ACTION**
**Against Defendants City of Lima and Allen County**
**(42 U.S.C. § 1983)**
**(Violation of Civil Rights by Policy, Practice or Custom)**

67. Plaintiff incorporates herein by reference the allegations contained in paragraphs 1 through 66.

68. Defendants City of Lima and Allen County have developed and maintained policies, practices, and customs demonstrating a deliberate indifference to the constitutional rights of citizens.

69. Defendants City of Lima and Allen County have failed to implement policies and procedures designed to protect the constitutional rights of citizens. As a result, the law enforcement officers of the City of Lima and Allen County have been inadequately trained in the proper use of force.

70. Defendants City of Lima and Allen County have practices or customs of failing to properly investigate complaints of misconduct.

71. Defendants City of Lima and Allen County have practices or customs of failing to properly discipline officers for misconduct. These practices or

customs include tolerating or ratifying the use of excessive force by law enforcement officers.

72. Such practices or customs caused the deprivation of Wrinn's constitutional rights.

73. As a direct and proximate result of the above, Wrinn has suffered severe physical and mental injuries for which Defendants City of Lima and Allen County are liable.

**FOURTH CAUSE OF ACTION**
**Against All Defendants**
**(42 U.S.C. § 1983)**
**(Conspiracy to Violate Plaintiff's Civil Rights)**

74. Plaintiff incorporates herein by reference the allegations contained in paragraphs 1 through 73.

75. Acting under color of state law, the Defendants conspired, agreed, and acted with others in using excessive force against Wrinn.

76. Such conspiracy deprived Wrinn of his constitutional rights including his right to be free from unreasonable seizure as guaranteed by the Fourth and Fourteenth Amendments to the United States Constitution.

77. As a direct and proximate result of the above, Wrinn suffered severe physical and mental injuries for which the Defendants are liable.

**FIFTH CAUSE OF ACTION**
**Against Individual Defendants Johnson, Manley, Hile, Dunham, Douglass, Leary, Stevenson, Myers, Tomasi, and John Does 1-20**
**(42 U.S.C. § 1983)**
**(Failure to Intercede to Prevent Violations of Plaintiff's Constitutional Rights)**

78. Plaintiff incorporates herein by reference the allegations contained in paragraphs 1 through 77.

79. Defendants Johnson, Manley, Hile, Dunham, Douglass, Leary, Stevenson, Myers, Tomasi, and John Does 1-20 were acting under color of state law and were present while excessive force was being used against Wrinn.

80. Each of these Defendants had the opportunity to intercede on behalf of Wrinn and prevent the other Defendants from subjecting Wrinn to excessive force in violation of his constitutional rights.

81. Each of these Defendants, knowing that Wrinn had already been severely injured, ignored Wrinn's cries of pain while the other Defendants continued to strike Wrinn or otherwise cause him further injury.

82. Such failure to intercede by the Defendants deprived Wrinn of his constitutional rights including his right to be free from unreasonable seizure as guaranteed by the Fourth and Fourteenth Amendments to the United States Constitution.

83. As a direct and proximate result of the above, Wrinn suffered severe physical and mental injuries for which these Defendants are liable.

**SIXTH CAUSE OF ACTION**
**Against Defendants Koverman, Beck, Garlock, Cortes, Leary, Stevenson, Myers, and John Does 1-20**
**(42 U.S.C. § 1983)**
**(Failure of Supervisors to Prevent Civil Rights Violations)**

84. Plaintiff incorporates herein by reference the allegations contained in paragraphs 1 through 83.

85. Defendants Koverman, Beck, Garlock, Cortes, Leary, Stevenson, Myers, and John Does 1-20, as supervisors acting under color of state law, knew or in the exercise of due diligence should have known that the conduct of the other Defendant law enforcement officers was likely to occur.

86. These Defendants failed to take any preventative or remedial measures to guard against the conduct of the other Defendant law enforcement officers.

87. These Defendants failed to properly train, instruct, supervise, and discipline the other Defendant law enforcement officers.

88. These Defendants have failed to conduct meaningful investigations into allegations that officers under their supervision used excessive force in violation of citizens' constitutional rights. By failing to properly investigate such allegations, these

Defendants have ratified the use of excessive force by officers under their supervision.

89. Such failure to properly supervise by these Defendants deprived Wrinn of his constitutional rights including his right to be free from unreasonable seizure as guaranteed by the Fourth and Fourteenth Amendments to the United States Constitution.

90. As a direct and proximate result of the above, Wrinn suffered severe physical and mental injuries for which these Defendants are liable.

**SEVENTH CAUSE OF ACTION**
**Against Defendants Hile, Dunham, Douglass, Tomasi, and John Does 6-20**
**(Assault and Battery under State Law)**

91. Plaintiff incorporates herein by reference the allegations contained in paragraphs 1 through 90.

92. Defendants Hile, Dunham, Douglass, Tomasi, and John Does 6-20 intentionally used force against Wrinn that was excessive, and unjustified.

93. These Defendants' actions constitute assault and battery.

94. As a direct and proximate result the assault and battery, Wrinn suffered severe physical and mental injuries for which these Defendants are liable.

**EIGHTH CAUSE OF ACTION**
**Against Defendants Hile, Dunham, Douglass, Tomasi, and John Does 6-20**
**(Intentional Infliction of Emotional Distress under State Law)**

95. Plaintiff incorporates herein by reference the allegations contained in paragraphs 1 through 94.

96. Defendants Hile, Dunham, Douglass, Tomasi, and John Does 6-20 verbally abused Wrinn and intentionally used force against Wrinn that was excessive and unjustified.

97. Defendants Hile, Dunham, Douglass, Tomasi and John Does 6-20 did not consider that Wrinn had suffered a severe head injury and was unable to comprehend their instructions.

98. Instead of rendering assistance to Wrinn, these Defendants ignored Wrinn's numerous cries in pain while they repeatedly struck him or otherwise caused him further injury.

99. The actions of these Defendants were extreme and outrageous.

100. As a direct and proximate result of the above, Wrinn suffered physical injuries and emotional distress for which these Defendants are liable.

WHEREFORE, Plaintiff Eugene Wrinn, Jr. requests that this Court:

(a) Enter judgment in his favor and against the Defendants, jointly and severally;

(b) Award compensatory damages;

(c) Award punitive damages;

(d) Award all costs and expenses incurred in the prosecution of this action;

(e) Award reasonable attorneys' fees as provided by 42 U.S.C. § 1988; and

(f) Award such other relief as the Court deems just and proper.

Respectfully submitted,

*/s/ Cary Rodman Cooper*
Cary Rodman Cooper
C. Michael Piacentino
Counsel for Plaintiff

**JURY DEMAND**

Plaintiff Eugene Wrinn, Jr. requests a trial by jury.

*/s/ Cary Rodman Cooper*
Cary Rodman Cooper
C. Michael Piacentino

## APPENDIX K

## COURT OF CLAIMS OF OHIO

**No. 2006-05934**
**Judge J. Craig Wright**

**[Filed September 13, 2006]**

EUGENE WRINN, JR.
1945 Weatherhead Hollow Rd.
Guilford, Vermont 05301

Plaintiff

vs.

STATE OF OHIO
Ohio State Highway Patrol
Lima Patrol Post
2005 East Fourth St.
Lima, OH 45804

DAREN JOHNSON
Ohio State Highway Patrol
Lima Patrol Post
2005 East Fourth St.
Lima, OH 45804

G. K. MANLEY
Ohio State Highway Patrol
Lima Patrol Post
2005 East Fourth St.

Lima, OH 45804 )
)
Defendants. )
_____ )

**COMPLAINT**

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Counsel for Plaintiff

## I. INTRODUCTION.

1. This is an action for claims of assault and battery, intentional infliction of emotional distress, and failure to protect. These claims are brought against Sergeant Daren L. Johnson and Trooper G.K. Manley of the Ohio State Highway Patrol. These claims are also brought against the State of Ohio pursuant to Section 2743.02(A)(2) of the Ohio Revised Code.

## II. PARTIES.

2. Plaintiff, Eugene Wrinn, Jr. is resident of the State of Vermont.

3. Defendant State of Ohio employed Sergeant Daren Johnson and Trooper G. K. Manley at all times relevant to this action.

4. Defendant Daren Johnson was a Sergeant for the Ohio State Highway Patrol at all times relevant to this action.

5. Defendant G. K. Manley was a Trooper for the Ohio State Highway Patrol at all times relevant to this action.

## III. JURISDICTION.

6. The Court of Claims has jurisdiction over this matter pursuant to Section 2743.02 of the Ohio Revised Code.

## IV. FACTS.

7. On September 16, 2005 at approximately 2:00 AM, the plaintiff, Eugene Wrinn, Jr. ("Wrinn") was driving his vehicle in Allen County, Ohio. As Wrinn merged into the northbound lanes of Interstate 75 ("I-75") near State Route 309, Wrinn lost control of his vehicle due to heavy rain. His vehicle came to rest facing southbound in the northbound lanes of I-75. The vehicle stalled and Wrinn was unable to restart the vehicle in time to avoid being struck head-on by a tractor-trailer that was traveling northbound on I-75.

8. Wrinn and his two passengers suffered injuries as a result of the crash.

9. Wrinn suffered a head injury and lost consciousness.

10. Defendant, Sergeant Daren L. Johnson ("Sergeant Johnson") of the Ohio State Highway Patrol was the first law enforcement officer to arrive on the scene. When Sergeant Johnson arrived on the scene, Wrinn was still slumped over in the driver's seat of the vehicle.

11. As Sergeant Johnson approached the vehicle, Wrinn started to regain consciousness and attempted to exit the vehicle. Sergeant Johnson told Wrinn to remain in the vehicle.

12. Due to his head injury, Wrinn was disoriented and unable to comprehend Sergeant Johnson's instructions.

13. Still disoriented, Wrinn attempted to walk away from the vehicle.

14. Although Wrinn attempted to walk away from Sergeant Johnson, Wrinn did not act in a menacing or threatening manner toward Sergeant Johnson or anyone at scene of the crash.

15. Sergeant Johnson grabbed Wrinn in attempt to prevent him from walking away. Wrinn pulled away from Sergeant Johnson and a struggle ensued.

16. Sergeant Johnson used excessive force in the struggle with Wrinn.

17. Sergeant Johnson knew that Wrinn had just been injured in a motor vehicle crash.

18. Even knowing that Wrinn was already injured, Sergeant Johnson struck Wrinn several times with a flashlight using an overhand swing.

19. At least one of the strikes impacted the back of Wrinn's head causing severe injuries including a large laceration.

20. After being struck with the flashlight, Wrinn attempted to walk away from Sergeant Johnson. Sergeant Johnson then cycled his Taser on Wrinn's back, causing Wrinn to fall to the ground.

21. Still disoriented, Wrinn attempted to walk away again but Sergeant Johnson kicked Wrinn in the back of the legs causing Wrinn to fall to the ground again.

22. When Trooper G.K. Manley of the Ohio State Highway Patrol arrived, he and Sergeant Johnson forcefully took Wrinn to the ground and attempted to handcuff Wrinn.

23. Trooper G.K. Manley also struck Wrinn with a flashlight.

24. Other law enforcement officers from other agencies arrived and assisted Sergeant Johnson and Trooper Manley with handcuffing Wrinn, who was prone on the ground writhing in pain.

25. Even though Wrinn was obviously injured and in severe pain, Defendants Johnson and Manley used excessive force in handcuffing Wrinn.

26. Some of the officers from other agencies also used excessive against Wrinn.

27. An officer from the Lima Police Department delivered approximately twelve (12) knee strikes to Wrinn's abdomen and thorax.

28. An officer from the Lima Police Department stepped on Wrinn's head and pushed Wrinn's head into the pavement with his foot.

29. Wrinn was handcuffed and his legs were secured with a tow strap from one of the patrol cars. Wrinn was then transported to the Lima Memorial Hospital.

30. As a result of this incident, Wrinn was hospitalized for approximately five days and received other medical treatment. He was treated for several injuries including the trauma to his head. Numerous staples were required to close the large lacerations on his head. Wrinn's injuries also included several cuts and bruises on his wrists from the handcuffs. Wrinn incurred medical expenses in excess of $30,000.00.

31. As a direct and proximate result of the Defendants' actions, Wrinn suffered severe, debilitating, and permanent physical and mental injuries. He is expected to receive additional treatment for these injuries in the future.

32. As a direct and proximate result of the Defendants' actions, Wrinn lost wages, he is expected to lose additional wages in the future, and his earning capacity has been harmed.

33. As a direct and proximate result of this incident, Wrinn endured substantial pain and suffering and will continue to endure pain and suffering in the future.

34. As a direct and proximate result of this incident, Wrinn suffered extreme emotional distress and will continue to suffer emotional distress in the future.

35. Wrinn received a traffic citation for failure to control but has not received any criminal charges related to this incident.

**FIRST CAUSE OF ACTION**
**(Assault and Battery)**

36. Plaintiff incorporates herein by reference the allegations contained in paragraphs 1 through 35.

37. Sergeant Johnson and Trooper Manley intentionally used force against Wrinn that was excessive and unjustified.

38. The actions of Sergeant Johnson and Trooper Manley constitute assault and battery.

39. As a direct and proximate result of the above, Wrinn suffered severe physical and mental injuries for which the Defendants are liable.

## SECOND CAUSE OF ACTION
## (Intentional Infliction of Emotional Distress)

40. Plaintiff incorporates herein by reference the allegations contained in paragraphs 1 through 39.

41. Sergeant Johnson and Trooper Manley intentionally used force against Wrinn that was excessive and unjustified.

42. Sergeant Johnson and Trooper Manley did not consider that Wrinn had suffered a severe head injury and was unable to comprehend their instructions.

43. Instead of rendering assistance to Wrinn, Sergeant Johnson and Trooper Manley ignored Wrinn's numerous cries in pain while they repeatedly struck him or otherwise caused him further injury.

44. The actions of Sergeant Johnson and Trooper Manley were extreme and outrageous.

45. As a direct and proximate result of the above, Wrinn suffered physical injuries and emotional distress for which the Defendants are liable.

## THIRD CAUSE OF ACTION
## (Failure to Protect)

46. Plaintiff incorporates herein by reference the allegations contained in paragraphs 1 through 45.

47. Sergeant Johnson and Trooper Manley placed Wrinn into their custody.

48. Sergeant Johnson and Trooper Manley had a duty to protect Wrinn from harm while he was in their custody.

49. Sergeant Johnson and Trooper Manley breached that duty by failing to protect Wrinn from the excessive use of force by the other officers at the scene.

50. As a direct and proximate result of the above, Wrinn suffered severe physical and mental injuries for which the Defendants are liable.

**FOURTH CAUSE OF ACTION**
**(Liability of the State of Ohio)**

51. Plaintiff incorporates herein by reference the allegations contained in paragraphs 1 through 50.

51. Sergeant Johnson and Trooper Manley are officers or employees of the State of Ohio pursuant to Section 109.36 of the Ohio Revised Code.

52. Pursuant to Section 2743.02(A)(2) of the Ohio Revised Code, the State of Ohio is liable for the actions of Sergeant Johnson and Trooper Manley if they are determined to have personal immunity pursuant to Section 9.86 of the Ohio Revised Code.

WHEREFORE, Plaintiff Eugene Wrinn, Jr. requests that this Court:

(a) Enter judgment in his favor and against the Defendants;

(b) Award compensatory damages;

(c) Award punitive damages;

(d) Award all costs and expenses incurred in the prosecution of this action;

(e) Award all reasonable attorneys' fees;

(f) Award such other relief as the Court deems just and proper

Respectfully submitted,

/s/ Cary Rodman Cooper
Cary Rodman Cooper
Counsel for Plaintiff

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(2)

Supreme Court, U.S.
FILED
OCT 16 2009
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No. 09-208

# In the Supreme Court of the United States

EUGENE WRINN, JR.,

*Petitioner,*

v.

DAREN JOHNSON, G.K. MANLEY, AND K.J. KOVERMAN,

*Respondents.*

*ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT*

## BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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## QUESTION PRESENTED

Is the waiver provision of the Ohio Court of Claims Act—which offers plaintiffs the choice of either pursuing a claim against the State of Ohio in the Ohio Court of Claims or pursuing related claims in other courts, but does not effectively bar plaintiffs from pursuing federal claims—consistent with the Supremacy Clause of the United States Constitution, art. VI, cl. 2?

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## INTRODUCTION

The Ohio Court of Claims Act ("OCCA") provides that a plaintiff who files a civil action in the Ohio Court of Claims waives any other cause of action against a state officer or employee that is based on the same conduct. Ohio Rev. Code § 2743.02(A)(1). A plaintiff therefore may choose either to seek money damages against the State in the Ohio Court of Claims or to pursue other claims, such as a federal action under 42 U.S.C. § 1983, in other courts. Because Ohio voluntarily waives its immunity in exchange for the plaintiff's voluntary waiver of other claims, the OCCA strikes a fair bargain that passes constitutional muster. And because the OCCA does not create immunity from federal liability, the waiver provision is consistent with the Supremacy Clause of the United States Constitution, U.S. Const., art. VI, cl. 2.

Petitioner Eugene Wrinn instituted a federal action against three Ohio State Highway Patrolmen, then filed a related action in the Ohio Court of Claims. Applying the OCCA waiver provision, the federal district court dismissed Wrinn's federal claims and the Sixth Circuit Court of Appeals affirmed. Wrinn now asks this Court to review that decision, arguing that the OCCA violates the Supremacy Clause by creating a state-law defense to federal civil rights claims. But as the Sixth Circuit has repeatedly held, the OCCA does no such thing. The OCCA allows plaintiffs to pursue federal civil rights claims, but provides that such claims are waived if a plaintiff chooses instead to pursue the State's deep pockets in the Ohio Court of Claims.

Alternatively, Wrinn asks the Court to grant certiorari, vacate the Sixth Circuit's decision, and

remand for reconsideration in light of *Haywood v. Drown*, 129 S. Ct. 2108 (2009), which the Court decided shortly after the Sixth Circuit issued its decision below. But there is no reason for the Sixth Circuit to reconsider its decision because, unlike the OCCA waiver provision, the statute at issue in *Haywood* effectively deprived plaintiffs of a federal remedy.

In spite of Wrinn's best efforts to portray a novel question of constitutional law, to manufacture a circuit split, and to raise nonexistent federalism concerns, his petition for certiorari fails to articulate a legal issue meriting this Court's attention. For these reasons, the Court should deny Wrinn's petition.

## COUNTERSTATEMENT

### A. Wrinn filed simultaneous actions in federal and state court.

Wrinn sued Respondents Daren Johnson, G.K. Manley, and K.J. Koverman ("Patrolmen") and other defendants in federal district court on September 11, 2006. According to Wrinn's federal complaint, the Patrolmen and other officials injured Wrinn when they used excessive force in striking and handcuffing him following a traffic accident that occurred near Lima, Ohio, roughly one year earlier. App. 77a-83a. Wrinn stated eight claims—six under 42 U.S.C. § 1983 and two under Ohio law. App. 81a-89a.

Two days later, Wrinn filed a separate action in the Ohio Court of Claims. The state court complaint named three defendants—the State of Ohio and two of the Patrolmen—and stated four claims under Ohio law. App. 93a, 97a-99a. The Ohio Court of Claims

promptly dismissed the Patrolmen as defendants on the ground that "only state agencies and instrumentalities can be defendants in original actions in the Court of Claims." *Wrinn v. Ohio State Highway Patrol*, Case No. 2006-05934, Pre-Screening Entry (Sept. 15, 2006) (citing Ohio Rev. Code § 2743.02(E)). Then, finding that Wrinn's federal court action "may be partially or wholly dispositive of" the state court action, the court stayed the state court action pending resolution of the federal court dispute. *Wrinn v. Ohio State Highway Patrol*, Case No. 2006-05934, Entry Staying Proceedings (Dec. 5, 2006).

### B. The district court dismissed the Patrolmen as defendants.

Meanwhile, in federal court, the Patrolmen moved to dismiss Wrinn's federal complaint under Fed. R. Civ. P. 12(b)(6). The Patrolmen argued, among other things, that the OCCA, Ohio Rev. Code § 2743.02(A)(1), required dismissal.

The OCCA created the Ohio Court of Claims and waived the State's immunity from liability, thus allowing suits against the State in that court. The OCCA includes a waiver provision, which provides: "Except in the case of a civil action filed by the state, filing a civil action in the court of claims results in a complete waiver of any cause of action, based on the same act or omission, which the filing party has against any officer or employee . . . ." *Id.* The Patrolmen asserted that, under this law, Wrinn waived his right to bring a § 1983 action in federal court when he availed himself of the jurisdiction of the Ohio Court of Claims. See App. 27a.

The district court granted the Patrolmen's motion to dismiss, App. 34a, following the Sixth Circuit's earlier holdings interpreting "the O.C.C.A. language as requiring a complete waiver of all claims, including federal claims, upon the filing of a similar complaint in the Ohio Court of Claims," App. 33a (citing *Leaman v. Ohio Dep't of Mental Retardation & Developmental Disabilities*, 825 F.2d 946 (6th Cir. 1987) (en banc), *cert. denied*, 487 U.S. 1204 (1988); *Turker v. Ohio Dep't of Rehab. & Corrs.*, 157 F.3d 453 (6th Cir. 1998)). The court later certified that its dismissal order was final, and therefore immediately appealable, under Fed. R. Civ. P. 54(b). App. 41a-42a.

### C. The Sixth Circuit affirmed the dismissal of Wrinn's § 1983 claim, and declined rehearing en banc.

On appeal, the Sixth Circuit attempted to clarify the scope of the OCCA's waiver provision by certifying a question to the Ohio Supreme Court. App. 9a-10a. But the Ohio Supreme Court dismissed the certified proceeding for lack of prosecution, App. 45a, when Wrinn failed to comply with the court's rules of practice, see App. 6a. Acting without guidance from the Ohio Supreme Court, the Sixth Circuit applied *Leaman*, 825 F.2d 946, and *Thomson v. Harmony*, 65 F.3d 1314 (6th Cir. 1995), *cert. denied*, 517 U.S. 1105 (1996), which "hold that a plaintiff waives all claims he may have against state officers, including federal claims, when he brings suit in the Court of Claims based on the same acts or omissions." App. 7a (internal quotation and citations omitted). The Sixth Circuit affirmed the dismissal of

Wrinn's § 1983 claims as barred by the OCCA's waiver provision. *Id.*

Wrinn petitioned for rehearing en banc and the Sixth Circuit denied the petition, "conclud[ing] that the issues raised in the petition were fully considered upon the original submission and decision of the case." App. 37a.

## REASONS FOR DENYING THE WRIT

Wrinn's claim that the OCCA waiver provision violates the Supremacy Clause is not worthy of this Court's review. The waiver provision does not violate the Supremacy Clause because it does not deprive plaintiffs of any federal remedy or grant state actors immunity for conduct that otherwise violates federal law. Instead, the OCCA opens otherwise unavailable state coffers to plaintiffs who choose not to pursue related actions in other courts.

The Sixth Circuit's decision is consistent with this Court's Supremacy Clause jurisprudence, including *Haywood*, 129 S. Ct. 2108. Although *Haywood* was decided after the Sixth Circuit resolved this case, its holding is limited to statutes that effectively immunize defendants from a federal action—which the OCCA waiver provision does not. Thus, there is no need for the Sixth Circuit to reconsider its decision in light of *Haywood*.

In urging the Court to grant certiorari, Wrinn attempts to manufacture a circuit split, and further invokes the principles of federalism and comity as grounds for review. But Wrinn does not identify any real conflict among the lower courts. Instead, he cites a handful of federal appeals court decisions explaining that, under the Supremacy Clause,

federal law preempts any state law that immunizes government conduct otherwise subject to suit under § 1983. Wrinn's efforts to invoke the principles of federalism and comity also fail because, contrary to Wrinn's assertions, the Sixth Circuit's interpretation of the OCCA is readily squared with the Ohio Supreme Court's interpretation of the statute.

The OCCA waiver provision is constitutional, and the dismissal of Wrinn's federal claims against the Patrolmen was proper. Wrinn offers no persuasive reason why the Court should grant certiorari.

### A. The Sixth Circuit properly held that the OCCA is consistent with the Supremacy Clause, and *Haywood* has no bearing on that conclusion.

Wrinn urges this Court to grant certiorari, vacate, and remand to ensure that the Sixth Circuit "fully examine[s]" the case "under this Court's Supremacy-Clause precedents, including the standards set forth in *Haywood*."[1] Pet. at 9. But the Sixth Circuit's decision is entirely consistent with the Court's Supremacy Clause jurisprudence, including the Court's 2009 decision in *Haywood*.

#### 1. The OCCA waiver provision does not violate the Supremacy Clause.

Wrinn mistakenly asserts that the OCCA waiver provision violates the Supremacy Clause.

---

[1] Wrinn's claim that "the Sixth Circuit declined to even address [his] Supremacy-Clause argument," Petition for Certiorari ("Pet.") at 9, is patently false. The Sixth Circuit explained that its holdings in *Leaman* and *Thomson* dictated the outcome of Wrinn's Supremacy Clause challenge, thereby incorporating the Supremacy Clause analysis from those decisions. App. 6a-7a.

Pet. at 10-12. The Supremacy Clause prohibits states from extinguishing a federal right by statute. U.S. Constitution, art. VI, cl. 2. But the OCCA waiver provision does not deprive plaintiffs of any federal remedy. Instead, as the Sixth Circuit has explained, the waiver provision offers plaintiffs a choice: They may seek to recover either from the State's coffers (in the Court of Claims) or from the individual state officers (in the court of common pleas or federal court), but not from both. *Leaman*, 825 F.2d at 953-54. Either way, this statutory *quid pro quo* is consistent with the Constitution. *Id.* at 955.

A state does not run afoul of the Supremacy Clause by inviting litigants to waive their federal rights as a condition of receiving a benefit. In *Town of Newton v. Rumery*, 480 U.S. 386 (1987), for example, the defendant town agreed to drop criminal charges against the plaintiff if he promised not to bring a wrongful-arrest claim against the town or its officials. *Id.* at 390. This court held that such a "release-dismissal agreement" is enforceable if (1) it is voluntary, (2) there is no evidence of prosecutorial misconduct, and (3) it would not adversely affect the public interest. *Id.* at 398.

Ohio Rev. Code § 2743.02(A)(1) provides, in pertinent part:

> Except in the case of a civil action filed by the state, filing a civil action in the court of claims results in a complete waiver of any cause of action, based on the same act or omission, which the filing party has against any officer or employee, as defined in section 109.36 of the Revised Code. The

> waiver shall be void if the court determines that the act or omission was manifestly outside the scope of the officer's or employee's office or employment or that the officer or employee acted with malicious purpose, in bad faith, or in a wanton or reckless manner.

Under this statute, a plaintiff may choose either to pursue a claim for money damages against Ohio in the Ohio Court of Claims or pursue other claims, like a § 1983 action, in other courts. As the Sixth Circuit has repeatedly recognized, this exchange—the State's voluntary waiver of immunity for the plaintiff's voluntary waiver of other claims—represents a fair bargain and passes constitutional muster. See, e.g., *Leaman*, 825 F.2d at 954; *Plinton v. County of Summit*, 540 F.3d 459, 462-63 (6th Cir. 2008) (applying *Leaman*, 825 F.2d 946); *Thomson*, 65 F.3d at 1319 (same).

The Sixth Circuit came to this conclusion, in part, because there are only two circumstances in which an individual may sue a State: Congress may authorize a suit to enforce the Fourteenth Amendment, *Fitzpatrick v. Bitzer*, 427 U.S. 445, 446 (1976), or a State may voluntarily waive its sovereign immunity, *Clark v. Barnard*, 108 U.S. 436, 447-48 (1883). Excepting these two situations, States enjoy sovereign immunity. Because "Ohio was under no constitutional duty to let itself be sued at all, . . . it was not unreasonable for the state to tell prospective plaintiffs—in words not unlike those used by the United States itself in the Federal Tort Claims Act—'we will agree to let you sue the sovereign if you will agree to surrender your claims

against the sovereign's servants.'" *Leaman*, 825 F.2d at 954.

There is "nothing inconsistent with § 1983 in the offer the state has made in its Court of Claims Act. The Ohio statute gives claimants an option not otherwise available to them, and any claimant who does not like the statutory option is perfectly free to reject it and prosecute a § 1983 action against the state's officials just as if the Court of Claims Act had never been passed." *Leaman*, 825 F.2d at 953. For these reasons, the OCCA waiver provision does not violate the Supremacy Clause.

**2. *Haywood* does not call into question the constitutionality of the OCCA waiver provision.**

*Haywood* in no way alters the constitutional analysis of the OCCA waiver provision. In *Haywood*, the Court held that a New York law that prohibits state courts from hearing civil rights claims against corrections personnel violates the Supremacy Clause. *Haywood*, 129 S. Ct. at 2118. Unlike the New York law at issue in *Haywood*, however, the OCCA does not effectively immunize state officials from federal claims, for the reasons explained above. Therefore, *Haywood* has no bearing on the outcome of Wrinn's Supremacy Clause challenge.

At issue in *Haywood* was New York Correction Law § 24, which provides that no action may be brought in any state court against any officer or employee of New York's Department of Correctional Services for acts done in the discharge of their duties, and that any claim arising from such acts may be pursued only as a claim against the state in

the New York Court of Claims. As a jurisdictional law, it closed New York's courts to federal civil rights claims against corrections officers. *Id.* at 2112. It did not, however, shield other state employees, such as police.

In striking down the law, the Court held that States do not have authority to nullify a federal right or cause of action. The Court observed that federal law is as much the law of the States as the laws passed by their own legislatures, and that § 1983 claims are therefore part of each State's law. *Id.* at 2114. The Court also reiterated that states can neither immunize a defendant against nor create a defense or procedural bar to a federal claim. *Id.* at 2115. In light of these principles, the Court held that under the Supremacy Clause, "having made the decision to create courts of general jurisdiction that regularly sit to entertain analogous suits, New York is not at liberty to shut the courthouse door to federal claims that it considers at odds with its local policy." *Id.* at 2117.

The *Haywood* Court made clear that its holding was limited to laws that are effectively complete grants of immunity: "Our holding addresses only the unique scheme adopted by the State of New York—a law designed to shield a particular class of defendants (correction officers) from a particular type of liability (damages) brought by a particular class of plaintiffs (prisoners)." *Id.* at 2118.

Unlike New York's law, the OCCA does not create an absolute barrier against civil rights liability. See Ohio Rev. Code § 2743.02(A)(1). Wrinn *could have* filed his claim in federal court if he had forgone the separate state court action. The waiver

provision provides that a plaintiff may choose either to pursue a claim for money damages against Ohio in the Ohio Court of Claims or to pursue other claims, like a § 1983 action, in another court. *Leaman*, 825 F.2d at 953. As the Sixth Circuit has held, this exchange—the State's voluntary waiver of immunity for the plaintiff's voluntary waiver of his other claims—represents a fair bargain and passes constitutional muster. *Id.* at 954-55.

Because the OCCA does not foreclose civil rights claims entirely, but simply gives plaintiffs the option to bargain away one type of claim in exchange for another, Ohio's statute does not run afoul of *Haywood*'s limited holding. Thus, there is no need for the Sixth Circuit to reconsider its decision in light of *Haywood*.

**B. The Sixth Circuit's decision does not conflict with other lower court decisions.**

Wrinn argues that the decision below "conflicts with other circuit court decisions holding that state-created immunities and defenses cannot apply to bar federal claims," Pet. at 13, but this asserted conflict is nonexistent.

The Supremacy Clause prohibits States from enacting immunity statutes that bar § 1983 claims. Accordingly, "[c]onduct by persons acting under color of state law which is wrongful under 42 U.S.C. § 1983 . . . cannot be immunized by state law." *Martinez v. California*, 444 U.S. 277, 284 n.8 (1980); see *Felder v. Casey*, 487 U.S. 131, 139 (1988) ("[A] state law that immunizes government conduct otherwise subject to suit under § 1983 is preempted."). Each of the five supposed conflict

cases cited by Wrinn says as much—and little more. See *Swipies v. Kofka*, 419 F.3d 709, 716 (8th Cir. 2005) (state cannot enact a good-faith defense to § 1983 liability); *Kimes v. Stone*, 84 F.3d 1121, 1127 (9th Cir. 1996) (conduct that violates § 1983 "cannot be immunized by state law"); *Palmer v. City of Monticello*, 31 F.3d 1499, 1504 (10th Cir. 1994) (same); *Davis v. Little*, 851 F.2d 605, 610-11 (2d Cir. 1988) ("[A] state rule of immunity or privilege which allows a state officer to escape liability. . . is simply not controlling under 42 U.S.C. § 1983." (internal quotation and citation omitted)); *Wade v. City of Pittsburgh*, 765 F.2d 405, 407 (3d Cir. 1985) ("The supremacy clause of the Constitution prevents a state from immunizing entities or individuals alleged to have violated federal law.").

None of the five cases cited by Wrinn is in conflict with the Sixth Circuit's decision. The Sixth Circuit agrees that federal law preempts any State law that immunizes government conduct otherwise subject to suit under § 1983. But the Sixth Circuit rejected Wrinn's Supremacy Clause challenge because it properly concluded, for the reasons explained above, that the OCCA does not immunize state officials from liability for conduct that would be actionable under § 1983. See App. 7a (citing *Leaman*, 825 F.2d 946, and *Thomson*, 65 F.3d 1314).

### C. The Sixth Circuit's decision is consistent with the Ohio Supreme Court's interpretation of the OCCA.

Wrinn contends that "the Sixth Circuit has violated the comity that federal courts owe to state-court interpretations of state statutes, a deference that is fundamental to federalism," Pet. at 14, but

Wrinn's concern is easily dispelled: The Sixth Circuit's and Ohio Supreme Court's interpretations of the OCCA are consistent. See *Thomson*, 65 F.3d at 1319 (analyzing *Leaman*, 825 F.2d 946, in light of *Conley v. Shearer*, 595 N.E.2d 862 (Ohio 1992)). Contrary to Wrinn's assertions, the waiver provisions of the OCCA unambiguously apply to federal claims, and the Ohio Supreme Court has not said otherwise.

The OCCA provides that "filing a civil action in the court of claims results in a complete waiver of *any* cause of action, based on the same act or omission, which the filing party has against any officer or employee." Ohio Rev. Code § 2743.02(A)(1) (emphasis added). "The word 'any,' as used in the statute, is unambiguous," *Leaman*, 825 F.2d at 952, and it includes federal claims like Wrinn's. "In providing that an election to sue the state in the Court of Claims results in a complete waiver of any cognate cause of action against individual state officers or employees, the Ohio legislature clearly provided for waiver of federal causes of action, as well as causes of action based upon state law." *Id.* A plaintiff can therefore waive a federal § 1983 claim by filing a complaint in the Ohio Court of Claims.

This interpretation of the OCCA, as articulated by the Sixth Circuit's en banc opinion in *Leaman*, 825 F.2d 946, is consistent with the Ohio Supreme Court's subsequent decision in *Conley*, 595 N.E.2d 862, because these cases interpreted two different provisions of Ohio law. See *Thomson*, 65 F.3d at 1319. *Leaman* considered the OCCA waiver provision, Ohio Rev. Code § 2743.02(A)(1), while *Conley* considered a different subpart of the OCCA:

Ohio Rev. Code § 2743.02(F).[2] Subsection (F) sets forth the procedure for plaintiffs suing individual state officials. Specifically, it requires a plaintiff who has a potential claim against the State arising out of a state official's conduct to first ask the Court of Claims—rather than the court of common pleas—to determine whether the defendant has personal immunity under Ohio Rev. Code § 9.86. Ohio Rev. Code § 2743.02(F). A suit against the official can go forward in the common pleas court only if the Court of Claims determines that the official does not have personal immunity under § 9.86.

In *Conley*, the Ohio Supreme Court was confronted with a dispute under the personal immunity provision, § 9.86, and subsection (F) of the OCCA—not subsection (A)(1). 595 N.E.2d at 864. A common pleas court had dismissed Conley's suit against an Ohio law enforcement official because Conley failed to follow § 2743.02(F)'s dictate and file

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[2] Subsection (F) provides in relevant part:

> A civil action against an officer or employee . . . that alleges that the officer's or employee's conduct was manifestly outside the scope of the officer's or employee's employment or official responsibilities, or that the officer or employee acted with malicious purpose, in bad faith, or in a wanton or reckless manner shall first be filed against the state in the court of claims, which has exclusive, original jurisdiction to determine, initially, whether the officer or employee is entitled to personal immunity under section 9.86 of the Revised Code and whether the courts of common pleas have jurisdiction over the civil action.

Ohio Rev. Code § 2743.02(F).

first in the Court of Claims. 595 N.E.2d at 862. The Ohio Supreme Court held that the common pleas court's dismissal of the state law claims was proper. *Id.* at 868-69. The *Conley* court then held, however, that the common pleas court erred in dismissing Conley's federal § 1983 claim. *Id.* at 870. The court explained that § 2743.02(F) and the personal immunity provision, § 9.86, "do not apply to claims brought under federal law" because the personal immunity provision "expressly limits its coverage to 'any civil action that arises under *the law of this state*.'" *Id.* at 869 (quoting Ohio Rev. Code § 9.86).

*Conley* stands for the proposition, then, that the procedural requirements of § 2743.02(F) do not apply to § 1983 claims. And for good reason: Section 2743.02(F)'s procedural mechanism is about allowing the Court of Claims to make the initial determination of immunity under § 9.86. When the claim arises under federal law, however, there is no immunity determination to make, because § 9.86 guards state officials from liability only under *state* law. Section 2743.02(F)'s procedural mechanism is thus irrelevant to federal law claims.

*Conley*'s holding concerning the procedural requirement of § 2743.02(F) therefore has no bearing on the proper interpretation of the OCCA waiver provision, § 2743.02(A)(1), for the simple reason that these two provisions are distinct, and the Ohio Supreme Court considered only subsection (F), not subsection (A)(1). The Sixth Circuit has explained as much. See *Thomson*, 65 F.3d at 1319 ("*Conley* does not alter the calculus where a party chooses to waive certain claims in order to gain access to the state's coffers via the Court of Claims. . . ."). In other words,

a plaintiff *may*, consistent with § 2743.02(F) and *Conley*, sue a state official under § 1983 in common pleas court (or, for that matter, in federal court). Once he does so, however, the waiver provision, § 2743.02(A)(1), dictates that he gives up the right to pursue the State's deep pockets in a separate action.

To the extent Wrinn's objection is that the Ohio Supreme Court, not the Sixth Circuit, should distinguish *Conley*, the fault lies with him. The Sixth Circuit attempted to certify the question to the Ohio Supreme Court, App. 9a-10a, but the Ohio Supreme Court dismissed the certified question because of Wrinn's lack of prosecution, App. 45a.

Accordingly, consistent with the Sixth Circuit's proper interpretation of the OCCA waiver provision, the interaction of *Leaman* and *Conley* does not raise any legitimate federalism concerns.

## CONCLUSION

For the foregoing reasons, Wrinn's petition for writ of certiorari should be denied.

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No. 09-208

# In The Supreme Court of the United States

EUGENE WRINN, JR.,
*Petitioner,*

v.

DAREN JOHNSON, G.K. MANLEY, AND K.J. KOVERMAN,
*Respondents.*

*On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit*

## REPLY SUPPORTING PETITION FOR WRIT OF CERTIORARI

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## REPLY IN SUPPORT OF GRANTING THE WRIT

### ARGUMENT

Wrinn has been barred by a state-created immunization or jurisdictional rule from seeking redress for violations of his federal civil rights. And it is the Ohio Court of Claims that will make the threshold determination of whether the automatic waiver is void based upon the employees' conduct. Respondents contend that this bar is constitutional because Ohio gives up its sovereign immunity in the Ohio Court of Claims Act ("OCCA") in exchange for the waiver of all other related claims, including federal claims. The application of this idiosyncratic rule violates the Supremacy Clause by nullifying a federal right.[1] It is for these reasons that the Supreme Court of Ohio ruled in *Conley v. Shearer* that the OCCA was not applicable to federal claims.[2] The Sixth Circuit disregarded *Conley* and Respondents continue to do so by advocating a strained and narrow interpretation of the case.

Moreover, the Sixth Circuit did not have the guidance from this Court as to the interplay between state jurisdictional statues and § 1983 claims established months later in *Haywood v. Drown*.[3] This Court should grant Wrinn's petition for certiorari,

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[1] *Haywood v. Drown*, 129 S. Ct. 2108, 2115 (2009) (confirming such a practice violates the Supremacy Clause). *See* discussion, *infra*, at section C.

[2] 64 Ohio St.3d 284, 595 N.E.2d 862, 869 (Ohio 1992).

[3] *Haywood v. Drown*, 129 S. Ct. 2108.

vacate, and remand, to have Wrinn's appeal examined under the Supremacy Clause in light of *Haywood*[4] and under the Supreme Court of Ohio's interpretation of state law.[5]

If this Court does not vacate and remand, it should exercise its supervisory powers and consider the important constitutional and federalism issues raised by the merits of Wrinn's appeal. Without this relief, countless other plaintiffs will be likewise subjected to Ohio's across-the-board nullification of federal civil rights.

### A. The OCCA waiver provision violates the Supremacy Clause.

Contrary to Respondents' contention in its brief in opposition to the petition for writ of certiorari, the Sixth Circuit did not address Wrinn's Supremacy Clause arguments. Although the Sixth Circuit stated that it based its decision on *Leaman*[6] and *Thomson*,[7] it did not, as Respondents assert, state that its *Leaman* or *Thomson* holdings "dictated the outcome of Wrinn's Supremacy Clause challenge," or otherwise incorporate any Supremacy Clause analysis from either of those

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[4] 129 S. Ct. 2108. *See infra*, at section C.

[5] *Conley*, 64 Ohio St.3d 284, 595 N.E.2d 862. *See infra*, at section B.

[6] *Leaman v. Ohio Dep't of Mental Retardation & Developmental Disabilities*, 825 F.2d 496 (6th Cir. 1987) (en banc).

[7] *Thomson v. Harmony*, 65 F.3d 1314, 1318-19 (6th Cir. 1998).

decisions.[8] Nor does the decision below cite or reference *Howlett v. Rose*[9] or any other Supremacy Clause precedent.[10]

Even assuming that a Supremacy Clause analysis can be implied from the decision below, Respondents' reliance on *Town of Newton v. Rumery*[11] and the analogy to the enforceability of criminal release-dismissal agreements is misplaced.[12] In *Rumery*, the Court applied federal common law to the question of whether release-dismissal agreements were per se unenforceable because of their potential to undermine the broad remedial purpose of § 1983.[13]

The Court looked to the Second Restatement of Contracts for the principle that "a promise is unenforceable if the interest in its enforcement is outweighed in the circumstances by a public policy

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[8] *See* Brief in Opposition at 6, n.1; App. 6a-7a. In fact, the *Thomson* majority opinion did not address or raise any issue with the Supremacy Clause. Rather, the *Thomson* court restated the *Leaman* analysis regarding the waiver provision and the purported *quid pro quo*. 65 F.3d at 1318-19.

[9] 496 U.S. 356 (1990).

[10] In *Haywood*, this Court emphasized that "[w]e have never treated a state's invocation of 'jurisdiction' as a trump that ends the Supremacy Clause inquiry." 129 S. Ct. at 2117 citing *Howlett*, 496 U.S. at 382-83 (internal citations omitted).

[11] 480 U.S. 386 (1987).

[12] Brief in Opposition at 6-9.

[13] 480 U.S. at 392.

harmed by enforcement of the agreement."[14] Applying these contract principles to the specific release-dismissal agreement before it, the Court refused to find release-dismissal agreements per se invalid. A plurality of the Court found that Rumery had waived his federal civil-rights claims because the particular release-dismissal agreement satisfied a three-part test: (1) the agreement was voluntarily made; (2) there was no evidence of prosecutorial misconduct; and (3) enforcement of the agreement did not adversely affect the relevant public interests.[15]

*Rumery* and its three-part test do not apply to Wrinn's case or to the OCCA's waiver provision. This is not a case about the administration of criminal justice; no prosecutorial discretion was involved; there is no complaining witness's interests at stake; Wrinn's counsel did not draft the OCCA; and neither Wrinn nor his counsel engaged in an arms-length bargain with the State of Ohio.[16] The OCCA's waiver provision is automatically applied to invalidate Wrinn's § 1983 claims.[17] Wrinn did not voluntarily waive his right to bring his federal claims. Rather, pursuant to a justified reliance on the Supreme Court of Ohio's

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[14] *Id.*

[15] *Id.* at 398. Recognizing that § 1983 actions "to vindicate civil rights may further significant public interests," the Court reasoned that other public interests could be served by allowing such agreements and considered the criminal defendant's personal interests in waiving his § 1983 claims. *Id.* at 395, 397-98.

[16] *Id.* at 392.

[17] *See* SHELDON H. NAHMOD, CIVIL RIGHTS AND CIVIL LIBERTIES LITIGATION: THE LAW OF SECTION 1983 § 9:72, 9-186 (4th ed. 1997).

interpretation of the OCCA in *Conley*,[18] Wrinn filed a federal civil-rights action against the individual officers in federal court and then filed a state action against the State of Ohio in the Court of Claims.

Respondents' reliance on *Rumery* underscores the need to grant Wrinn's petition to determine how *Rumery* would apply to Wrinn's case, if at all. This Court should grant Wrinn's petition to consider the adverse effect on the public interest in requiring all potential civil-rights plaintiffs to universally and prospectively waive federal civil-rights claims unless and until the Ohio Court of Claims determines whether the waiver is void.[19]

### B. The OCCA waiver provision does not apply to claims brought under federal law.

This Court should also grant the writ to ensure that the Sixth Circuit applies Ohio law as interpreted by Ohio's highest court. Respondents argue that the Supreme Court of Ohio's interpretation of the OCCA in *Conley*[20] is not controlling by understating the holding

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[18] 64 Ohio St.3d 284, 595 N.E.2d at 869.

[19] Under the construct established by the Sixth Circuit, civil-rights plaintiffs like Wrinn have to incur the expense and time of filing both in federal court against individual employees and against the State in the court of claims, have their federal action dismissed while the state court action is stayed, file a motion to have the state court determine some years down the line whether the OCCA waiver is void under OHIO REV. CODE § 2743.02(A)(1), before being able to proceed on the merits in either action. The result is absurd.

[20] 64 Ohio St.3d 284, 595 N.E.2d 862.

in that case. Although it is true that the direct question on appeal in *Conley* was whether the procedural mechanism in OHIO REV. CODE § 2743.02(F) violated the Equal Protection Clause, the court's decision about the OCCA's impact on federal claims is broader than subsection F and cannot rationally be limited to it.

The court in *Conley* sua sponte raised the Supremacy Clause issue, ruled categorically, and stated without qualification that – "R.C. 2743.02 and R.C. 9.86 . . . do not apply to claims brought under federal law."[21] The court could have limited its holding to subsection F's procedural mechanism – but it did not and its holding clearly states that the entirety of OHIO REV. CODE § 2743.02 does not apply to federal claims. In contrast to the Sixth Circuit's decision below, *Conley* relied upon the reasoning of this Court in *Howlett*[22] and recognized that state laws cannot have the effect of impairing federal claims.[23]

Respondents' narrow interpretation of *Conley* ignores the Supreme Court of Ohio's analysis and reasoning. As a result, Respondents insist that Ohio law still relegates to the Ohio Court of Claims the right to decide whether Wrinn may proceed with his § 1983 claims. According to Respondents, Wrinn has waived his federal claims unless the Ohio Court of Claims determines under OHIO REV. CODE § 2743.02(A)(1) that the waiver is void because the

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[21] *Id.* at 869.

[22] 496 U.S. 356.

[23] 64 Ohio St.3d 284, 595 N.E.2d at 869-70.

individual state employees acted beyond the scope of their employment, or acted with malicious purpose, in bad faith, or in a wanton or reckless manner.[24]

This interpretation of the OCCA and *Conley* cannot pass constitutional muster because the determination of the Ohio Court of Claims would necessarily go beyond the OCCA and affect Wrinn's § 1983 claims. That court would use the same procedural mechanisms under § 2743.02(A)(1) to determine if the waiver is void as it would to determine individual immunity under Ohio law and that a federal court would use to determine federal immunity under federal common law. That, however, is precisely the state control over a § 1983 claim that the Supreme Court of Ohio held is beyond "R.C. 2743.02 and R.C. 9.86" because it subordinates federal claims to Ohio's policy regarding immunity.[25] And it effectively acts as state-created immunity condemned by *Haywood*.[26]

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[24] *See* OHIO REV. CODE § 2743.02(A)(1); *Tweed v. Wilkinson*, No. 97-3661, 1998 U.S. App. LEXIS 8535, at *2 (6th Cir. Apr. 29, 1998).

[25] This Court has long held that the waiver of federal rights must be examined under federal common law. *See, e.g., Rumery*, 480 U.S. at 392.

[26] Respondents argue that the Sixth Circuit's decision is in line with other Circuit Court rulings regarding state-created immunities. (Brief in Opposition at 11-12). However, the assertion that "[t]he Sixth Circuit agrees that federal law preempts any State law that immunizes government conduct otherwise subject to suit under § 1983" assumes that the OCCA does not effectively immunize state actors from § 1983 liability. Petitioner contends that it does. Respondents apparently agree that if the OCCA

### C. This Court should grant the writ to ensure that *Leaman*'s en banc ruling is considered under the breadth of this Court's Supremacy Clause ruling in *Haywood*.

Respondents contend that *Rumery*, a criminal case whose applicability to the OCCA is not immediately apparent, is controlling, while simultaneously contending that *Haywood*, a § 1983 case considering a Supremacy Clause challenge to a state jurisdictional statute, is not. Respondents have it backwards.

At the time of the decision below, the Sixth Circuit had this Court's precedent in *Howlett*[27] as guidance and ignored it.[28] Shortly after the decision below, this Court expanded *Howlett's* holding and ruled that its reasoning was not limited to state immunity statutes.[29]

Respondents ascribe a narrow holding to *Haywood*,[30] but *Haywood* is unquestionably broader than *Howlett*, and is controlling here. If *Haywood* was limited in its application only to statutory grants of

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waiver is effectively an immunization, it cannot withstand the Supremacy Clause challenge.

[27] 496 U.S. 356.

[28] Apx. C to Petition for Writ of Certiorari, Memorandum Opinion and Judgment Entry of the United States District Court for the Northern District of Ohio granting the OSHP officers' Motion to Dismiss.

[29] *Haywood*, 129 S. Ct. 2108.

[30] *Id.*

immunity, then *Howlett* would have been dispositive.[31] *Haywood*, however, dealt with New York's jurisdictional divestment, similar to Ohio's, and found that a state cannot use its jurisdictional rule or policy as "a device to undermine federal law."[32] This Court declared that although "[s]tates retain substantial leeway to establish the contours of their judicial systems,"[33] states cannot "nullify a federal right or cause of action they believe is inconsistent with their local policies."[34] Accordingly, the Court found that New York's law limiting the types of § 1983 claims that could be brought against state employees ran afoul of the Supremacy Clause because it was "contrary to Congress's judgment that *all* persons who violate federal rights while acting under color of state law shall be held liable for damages."[35]

Without direction from this Court to reconsider the decision below in light of this intervening precedent, the Sixth Circuit will persist in applying its outdated pre-*Haywood* en banc ruling.[36] Respondents did not demonstrate how, without the involvement of this

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[31] *Id.* at 2115, n.5.

[32] *Id.* at 2116.

[33] *Haywood*, 129 S. Ct. at syllabus.

[34] *Id.*

[35] *Id.* (emphasis in original). "[Section] 1983, a Reconstruction-era statute, was passed to interpose the federal courts between the states and the people, as guardians of the people's federal rights." *Id.* at 2114 (internal citations omitted).

[36] *Leaman*, 825 F.2d 496.

Court, any district court or panel of the Sixth Circuit will have the authority to consider whether *Haywood* or *Conley* undermined *Leaman*'s en banc ruling.[37] As the Respondents would have it, all constitutional challenges to the OCCA's waiver provision in light of *Haywood* – and any other future decisions from this Court bearing on this issue – will receive their first and only consideration on petition for writ of certiorari. Rulings from this Court must be afforded more significance than this in cases still on direct appeal.

Moreover, the Sixth Circuit is the only Circuit in the nation with a state that has adopted a per se waiver rule that is a jurisdictional limitation on federal civil-rights claims. The question, therefore, of whether such a scheme is effectively an immunization, an unlawful defense, a procedural bar, or a device designed to undermine federal law will not be heard in any other Circuit.[38]

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[37] Indeed, the district court below felt compelled to disregard the Supreme Court of Ohio's interpretation of Ohio law that it found to be directly in conflict with the en banc ruling in *Leaman*. Apx. C to Petition for Writ of Certiorari, Memorandum Opinion and Judgment Entry of the United States District Court for the Northern District of Ohio granting the OSHP officers' Motion to Dismiss; *see also id.* at n.1 (noting that it was a dissenter of the en banc *Leaman* decision who authored a subsequent panel opinion following *Leaman*, "demonstrat[ing] the impact and authority of an en banc decision") (citing *Turker v. Ohio Dep't of Rehab. & Corr.*, 157 F.3d 453, 460 (6th Cir. 1998)).

[38] *Haywood*, 129 S. Ct. at 2116. Moreover, other states both inside and outside of the Sixth Circuit could be empowered to enact similar statutory schemes to shield themselves from federal civil-rights claims without any oversight.

## CONCLUSION

For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be granted.

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